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M. R. Elestropp.



M. R. Elestropp.







NEW
REPORTS
OF
Cases
HEARD IN
THE HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR;
AND DECIDED
DURING THE SESSION
1834.

By RICHARD BLIGH, Esq.
BARRISTER AT LAW.

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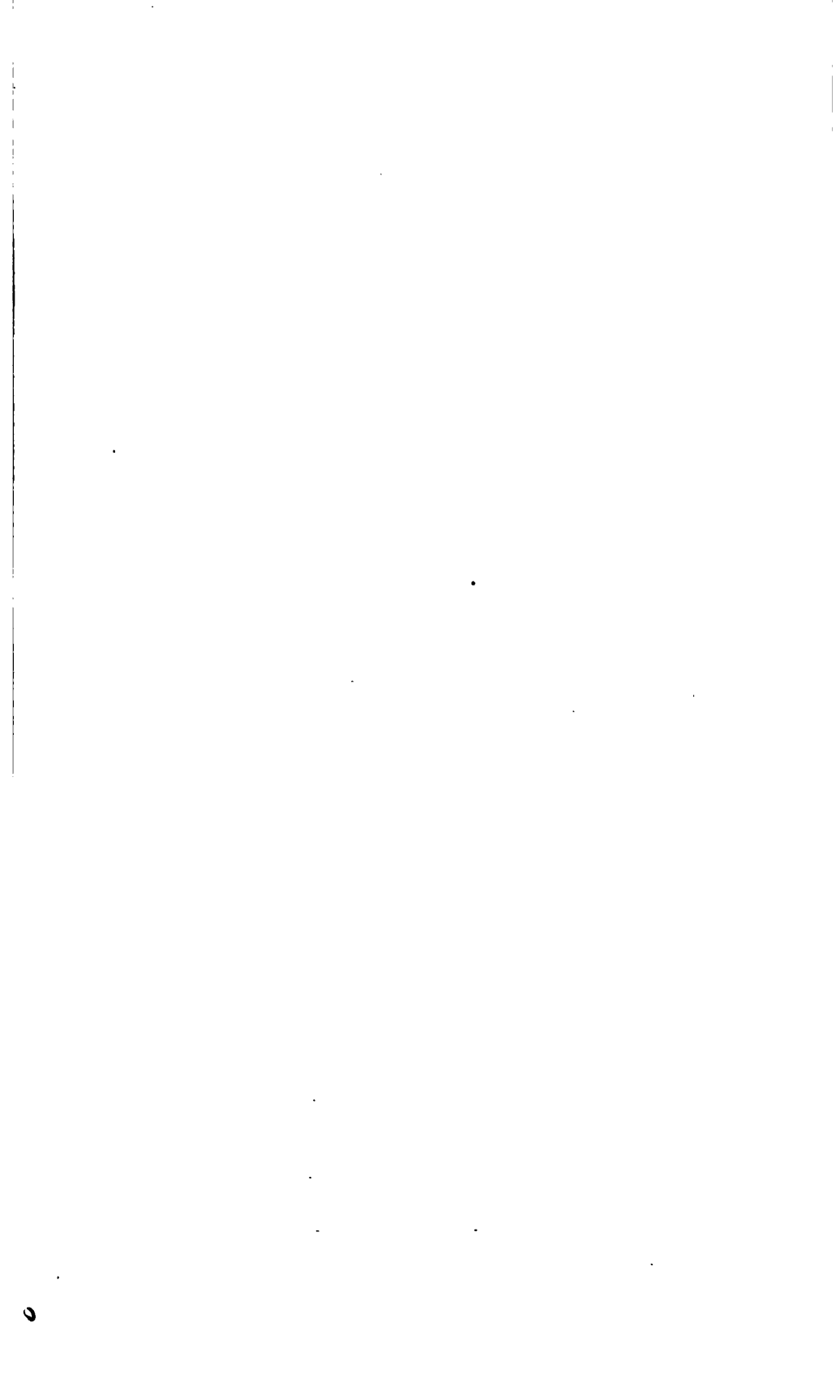
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Barons of the same several courts where it shall happen, either of said Chief Justice or Chief Baron for the time being to be absent, shall or may, at their discretion, within the place where the said courts are or shall be commonly kept in the said city and county of Dublin, within the term, or within four days next after every or any term, severally try all manner of issues joined or to be joined in any of the said several courts, which by the ordinary course of the law of the realm ought to be tried in any of the said courts by an inquest of the said city or county of Dublin."

A bill of indictment for subornation of perjury was found at the Session of Oyer and Terminer for the city of Dublin. The Defendant pleaded not guilty, and issue was then joined thereupon. The indictment and proceedings, with all things touching the same, were afterwards removed into the Court of King's Bench.

Held that a legal trial of that issue could not take place at *nisi prius* in the Court of King's Bench under the Irish statute 17 & 18 Car. 2. c. 20.

THIS case arose out of a prosecution against the Plaintiff in error, for subornation of perjury, in having procured one Mary Weston falsely to swear, that the prosecutor, Nicholas Mahon, was indebted to her in the sum of 60,000*l*.

The indictment was preferred before the Grand Jury of the county of the city of Dublin, at an adjournment of the commission of Oyer and Terminer, held in and for the said city, in the month of January, 1829.

The Grand Jury having found the bill, the Plaintiff in error was at the said commission arraigned thereupon, and pleaded "not guilty" thereto, after which the prosecutor having been advised to remove the proceedings, caused a writ of *certiorari* to be issued, by virtue of which the proceedings were removed from the said court, into His Majesty's Court of King's Bench, in Ireland.

The Plaintiff in error having been brought up to the Court of King's Bench, and asked in person, whether he wished to plead anew to the indictment, declined so to do, and abided by his plea. The issue came on to be tried, before the Chief Justice of the Court of King's Bench, at *nisi prius*, on the 14th of February, 1829, when the Plaintiff in error was convicted of the offence charged by the indictment.

The *postea* having been afterwards returned, the Plaintiff in error moved in arrest of judgment on several grounds, which were assigned as matter of error: the objections having been upon argument over-ruled, the Court of King's Bench pronounced a sentence of transportation upon the Plaintiff in error, under an act passed in the parliament of Ireland, in the third year of the reign of King George the Second, for the further punishment of subornation of perjury, and other crimes therein specified.

The Plaintiff in error having obtained leave to issue a writ of error to reverse the judgment, for alleged errors therein, accordingly issued a writ of error *coram nobis*, directed to the Court of King's Bench, and requiring the court to inspect the record of the judgment, and rectify such error (if any) as should be found therein.

The Plaintiff in error, upon being ruled to assign his errors, assigned upon the record errors in law, and errors in fact, to which assignment of error a demurrer was filed on the part of the prosecution, stating for cause the duplicity of the assignment of error, as well in assigning at one and the same time, error in law and error in fact, as in assigning several errors in fact; and also that the several

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supposed errors so assigned were not sufficient to reverse or invalidate the judgment.

The several matters so alleged for error, were argued in the Court of King's Bench, by the Plaintiff in error, and by his Counsel, and also on the part of the prosecution, in Michaelmas Term 1829, and in Hilary Term, 1830, after which the Court of King's Bench took time to deliberate thereupon, and on the 12th of February the court affirmed the judgment, superadding thereto a common law sentence of imprisonment.

Against this judgment, the Plaintiff in error sued out a writ of error in Parliament. The matters assigned for error were as follow :—

The Chief Justice, as a *nisi prius* Judge, could not, as such Judge, sitting in the vacation under the 17 & 18 C. 2., try an issue not joined, in the Court of King's Bench or Chancery, but at an adjournment of the Court of Oyer and Terminer, and which issue was not triable by the ordinary course of law :

The indictment could only be tried by removing it into the court by the extraordinary process of writs of *certiorari* and *habeas corpus* ; the enacting part of the statute in positive and express words confines such power of trying to issues joined at the time of the enactment of the statute, or to be joined after; and is further confined to issues triable by a jury, and was not extended to issues otherwise triable, as issues in law, *null tiel* record, &c. and the enacting part cannot be changed by the preamble or title; and the legislature did not intend to encourage the removal of indictments from the courts where they were joined to be tried above, and therefore did not extend the power of trial at *nisi*

prius to them; and the words "issues joined" cannot extend to issues joined in another court, and removed into the Court of King's Bench; for if so, the statute need not and would not in the enacting part have specified the Court of Chancery, if upon the issues being removed into the King's Bench, it then became an issue joined in the Court of King's Bench; and there were many reasons in the case why an issue joined in the Court of Chancery was not so necessary to be mentioned as issues joined in other courts; because the Court of Chancery and the Court of King's Bench as to trials of issues joined in the petty-bag side of the Court of Chancery, are one and the same court. 1 Harrison Chancery. 2 Howard's Chancery, 209. 1 Roll Abridgement, 744, 745. 1 Roll Reports, 287-29. Ass. 47-4. Institutes, 80. Dyer, 315. Moore, 570. pl. 728. Cunningham's Law Dictionary, Error 3. And as, in point of fact, they are one and the same court, it would seem to follow, that an issue joined in the Court of Chancery is, in reality, an issue joined in the Courts of King's Bench, as they are the same courts, and yet the statute considers the Judge of *nisi prius* could not have tried such issue so joined, or they would not have included the Court of Chancery in the enacting part.

Where a statute enumerates one class of particulars, it excludes by implication all others; and the mention of the King's Bench and Chancery excludes all other courts; and the reason why these are mentioned, and not the others, is obvious; because issues joined in the King's Bench and Chancery could by the ordinary course of law be tried only in the King's Bench, whereas the

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issues joined in other courts could be tried in the court below in which the issue was joined; and it was only by an extraordinary course of law, and not by the ordinary course of law, were they at all triable in the Court of King's Bench, and the Court of King's Bench can remit them back to their own court to try:

In *Carthew, 6, and Strange, 1227*, it was decided, that the Court of King's Bench could not give judgment on an indictment, tried below and removed after verdict, because they could not know the circumstances, and they either remit the record back, or they quash the *certiorari*; in the case of the *King v. Carpenter*, Mich. 11 G. 2., 4 Viner, *Certiorari*, 2 pl. 7. p. 362., it was decided by the Court, after a reference to their officer on application to the Court above, that the Court below should return the plea pleaded below, and thereby oust the Defendant of a demurrer put in above to the indictment, that the plea below should not be returned, except in case of a verdict; and even after verdict the Defendant may waive the plea, and go to trial on an issue joined in the court above; and that he has a right at all times, on a *certiorari* removing the record, to waive the plea below and plead *de novo*; whereas, in the present case, not only was the plea below returned, but even the award of the *venire*, and a day was given to the jury so awarded by the Court below, and to the parties, the 14th February, without bringing the Defendant before the Court with the record and *certiorari* by *habeas corpus*, as he was in custody, and if out on bail, by returning the bail-piece and enforcing his attendance thereon; and if not in custody or on bail, then by bringing him by warrant or process:

These *nisi prius* statutes have always received a construction according to the words; and the statute of Westminster giving the power of trying by *nisi prius* only to justices of assizes, was construed not to extend to the cities of London and Westminster in England, or the city or county of Dublin in Ireland, as no justices came into them to take assizes, and therefore the 18 E., c. 12. in England, and the 17 & 18 C. 2. c. 20. give the power of trying issues joined or to be joined in the respective courts to the Judges of the respective courts; though indictments are not mentioned, yet it is determined they are included under the words action. Now the preamble expressly states what issues formerly tried at bar may now be tried at *nisi prius*; they are not issues joined in the city or county of Dublin, but they are issues joined in any of His Majesty's Four Courts at Dublin, and the issues must not only be joined in one of the Four Courts, but it must be an issue triable in the city or county of Dublin, that is, where the *venue* is laid in the city or county of Dublin, this excludes issues struck in other counties, or in other words, where the *venue* is laid in other counties; but not only must the issue be joined in one of the Four Courts, and be triable or laid in the city of Dublin, but it must be an issue so joined, or to be joined, in one of the said Four Courts, which, by ordinary course of the laws of the realm, ought to be tried in one of the said Four Courts by an inquest of the said city or county of Dublin, and this excludes all issues joined in law or triable in any other way but by a jury of the city or county of Dublin.

The reason of making this statute was, as stated

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in the preamble, the great increase of the number of actions brought in those courts and tried at bar for speediness of trial ; but the present indictment was not an action brought in any of the Four Courts, nor was it an issue joined in any of said Four Courts, nor was this issue so joined below ordinarily triable at the bar of any of said Courts ; but by ordinary course it was triable in the Court below when issue was joined ; nor was it an action brought in any of the Four Courts for speediness of trial, for *certiorari* always delays and are not favoured, and increase the costs, and therefore this is not an issue, or trial of the issue within the words of the preamble, or of the enacting part, or of the purview, or of the mischief to be remedied, and no trials under it are valid, except of those issues designated and specified in plain words not to be mistaken in the enacting part, namely, of issues, joined or to be joined in one of the Four Courts in Dublin, that is, the Chancery, King's Bench, Common Pleas, and Exchequer :

So rigid has been the construction as to the power of trial, that it was held that the statute of Westminster did not empower the Barons of the Exchequer, unless they were sworn serjeants, to try issues at *nisi prius*, because the enacting part mentioned only the Chief Baron, and this was altered by the 8 G. 1. c. 6., which gives such power to the barons, the prime serjeant, attorney-general, solicitor-general, or any other of his Majesty's counsel learned in the law :

The 21 & 22 G. 3., c. 18., only enlarges the time of trial from four to ten days after trial, but does not enlarge their power in any other respect ; the words are, to " try all such issues, as by the " said act 17 & 18 C. 2. c. 20., they or any of them

“are enabled to try, in such place and manner, and
 “with and under such powers, authorities, and
 “provisions, as in and by the said recited or any
 “other act of parliament:”

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The words of the statute, “issues joined or triable in said Four Courts,” were necessary in order to validate a trial at *nisi prius* in the King’s Bench of an issue joined in Chancery; for if the words “validating said tryals,” were “shall be as valid as if the same had been tried in term at the bar of the court where such issue had been joined,” this would not have validated a trial at *nisi prius* of an issue joined in Chancery, because it was not tried at *nisi prius* in the court where the issue was joined. But by law, issues joined in Chancery, though not joined in the King’s Bench, were triable in the King’s Bench only; and to those issues so joined in Chancery and triable in the King’s Bench, does the enacting clause of the 17 & 18 C. 2. extend; but it does not extend nor cannot be construed to extend to any issue not joined in the King’s Bench or the Chancery, even though triable in the Court of King’s Bench, and for this plain reason, that it did not come within the remedy provided for heaping too much business on the Court, by the number of actions brought in same for speediness of trial, for the Court could not remit it, and need not try it if they had not leisure or did not like it; nor was it an action brought in said Court of King’s Bench in said city or county of Dublin for speediness of trial, which they were bound by the ordinary course of the law to try:

In the present case there was a most cogent reason why the Court should have remitted this

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cause back to be tried, because issue was joined below, a *venire* awarded, and an adjournment to said Court of Oyer and Terminer, to be holden the 14th February; and in 2 Hawkins, 288. it is laid down that after issue joined and *venire* awarded, the Court will not grant a *certiorari* :

When the legislature wished to extend any provision to any trials of issues, though not joined in the Court, they do not use the words, "issues joined or to be joined;" this appears in the 27 E., c. 6., s. 1., which enacts, where jurors returned for trial of any issues in the Courts of King's Bench, Common Pleas, Exchequer, or before justices of assizes, by the laws now in force, ought to have freehold of 40s., in every such case they shall have an estate of freehold of the yearly value of 4*l.* at least, and there shall be a clause in the *venire* to that effect :

It was held that the Court of Chancery, on an issue joined in that Court, had a power itself, though not named, to insert that clause; but such case is in fact within the words of the statute; for the *venire* issued for the trial of an issue in the Court of King's Bench for the issue joined in the Chancery must be tried there :

That the party Defendant, on a cause being removed by *habeas corpus* and *faciendum et recipiendum* or *certiorari*, in a civil cause, has a right to plead *de novo*, is settled beyond controversy; all the proceedings below are at an end; there must be a new plea, new bail, every thing new as to all done before. Skinner, 244.; 1 Salk. 8.; Cunningham's Law Dictionary, Habeas Corpus, 6.

Fifteen other errors were assigned; but the House being of opinion that the first error assigned

was sufficient to reverse the judgment, called upon the counsel for the Defendant in error to support the judgment.

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The counsel for the Crown argued that the issue was properly tried at *nisi prius*, before the Chief Justice, by virtue of the act of parliament of the 16 & 17 C. 2., inasmuch as the issue, although originally joined in the Court of Oyer and Terminer, became, and was by the removal of the proceedings from that court to the Court of King's Bench by the writ of *certiorari*, an issue joined in the Court of King's Bench, within the true meaning and construction of the act: That the issue joined in the inferior court was, together with all the other proceedings therein, actually removed by the writ of *certiorari*, from the inferior court into the Court of King's Bench, and therefore ceased to be an issue joined in the inferior court; and that as such issue continued and remained joined, it necessarily was, after such removal, an issue joined in the court to which it was so removed: That the statute of C. 2. ought to receive a liberal interpretation, and that the words "issue joined," used therein, are to be construed as synonymous with "issue depending," or "issue triable," in the court: That such must have been the construction put upon the act by the legislature itself, as appears by an act amending the same, passed in the 21 & 22 G. 3., and also by an act amending the last mentioned act, and passed in the 31st year of the same reign.

At the conclusion of the argument, Lord Denman, sitting as Deputy Speaker, said, the question was, whether the issue joined in the Court of Oyer and Terminer could be said under the circumstances to have been joined in the King's Bench.

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It had been argued that the objection (if any) had been waived by the Defendant in error as he proceeded to trial upon the record so made up. Upon this point he abstained at present from expressing his opinion, but moved that a question should be proposed to the Judges in the following terms:—

A bill of indictment for subornation of perjury is found at the sessions of Oyer and Terminer for the city of Dublin. The Defendant pleads not guilty, and issue is then joined thereupon. The indictment and proceedings, with all things touching the same, are afterwards removed into the Court of King's Bench. Can a legal trial of that issue take place at *nisi prius* in the same Court, under the first statute 17 and 18 Car. 2. c. 20.

Upon this question the unanimous opinion of the Judges was delivered by

Tindal C. J. C. P. as follows:—

After hearing the argument at the bar, we are of opinion that no legal trial of the issue could take place under the circumstances above stated.

If this point had depended solely upon the consideration what part of the record is removed by the writ of *certiorari*, it would have been difficult to contend that the trial could have been legal. For, although in point of form the whole record may be removed into the superior court by the general words of the writ of *certiorari*, yet, by the universal course and practice of the court, which is the law of the court of which the Judges are bound to take notice, no other part of the record but the bill of indictment itself is filed of record, and the party subject to such indictment is called upon by the superior court to plead *de novo* to the indictment when removed, and accordingly he may to

such indictment when so removed, instead of the general issue which may have been pleaded in the court below, either plead a special plea, or demur, or plead a pardon, as he may be advised under the circumstances of the case. Upon this ground therefore, we should be inclined to hold that no legal issue has been joined between the crown and the Defendant; and unless the issue has been properly joined, there can be no legal trial.

But the question put by your Lordships involves another and more important point, namely, assuming that the whole record is properly removed into the superior court, whether, under the true construction of the act 17 & 18 Car. 2., the authority is given to that court to proceed to try the issue? It appears to us, that the statute gives no authority to try the issue in the superior court.

The object of the act was to prevent the inconvenience of trials at bar, in the very numerous cases which at that time occurred, and for that purpose the statute proceeds to define what cases should in future be triable and tried at *nisi prius*, by the Chief Justice of the Court of King's Bench. The statute, after stating the difficulties which had occurred in practice, proceeds to enact, "that from henceforth, the Chief Justice of the King's Bench, for the time being, upon issue joined or about to be joined in the Court of King's Bench, or in the Court of Chancery, &c. shall try the same at *nisi prius*, &c." The great accuracy with which this is penned ought to be kept in view; it is not confined to issues joined or to be joined in the Court of King's Bench; but as it is well known that issues joined in the Petty Pay Office of the Court of Chancery are, without any intermediate

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proceeding, triable in the Court of King's Bench, the statute extends to and includes them also. The whole question turns upon the construction of the words above quoted, and we cannot think that by any reasonable construction an issue joined in an inferior court can be held to be an issue joined, or to be joined, in the Court of King's Bench.

Upon this ground we are all of opinion that the Court of King's Bench in Ireland had no jurisdiction under the statute to try this indictment.

Lord *Denman*—I concur entirely in the opinion delivered both upon the construction of the statute and upon the ground that the Defendant has a right, when the proceeding is removed to the higher court, to withdraw the plea which he may unadvisedly have pleaded in the court below, and to adopt a new line of defence upon more mature advice. He may have discovered objections to the indictment which make it subject to a demurrer, or he may be advised to plead special matters, upon which he may be entitled to have the judgment of the superior court, whether he is bound to answer the charge. I propose therefore to move, that the judgment of the court below be reversed.

Judgment reversed.

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Sir WILLIAM HORNE, Knight, His } *Appellant ;*
Majesty's Attorney General . . }

GEORGE JACKSON, Sir CHARLES }
FORBES, Bart., THOMAS FAULK- }
NER MIDDLETON, and GEORGE }
JACKSON JACKSON, JOHN ANDER- }
SON JACKSON, ANNE JACKSON and }
JANE JACKSON, Infants, by the } *Respondents.*
said GEORGE JACKSON, their Fa- }
ther and next Friend, and JOHN }
HOPTON FORBES and MATTHEW }
HALE . . . }

C. A., a surgeon in the army, residing in India, and having personal estate vested in funds there, as well as real estate and claims for prize money, made his will, noticing the state of his assets in India and his claims, and directing that his house and grounds should be sold by auction, and the produce placed to the credit of his estate; he left the whole of his property among his children equally, subject to certain regulations, and gave legacies to persons in England as well as in India, as expressed in his will. He thereby also noticing that his son was at school in Scotland, desired that his other children (daughters) should be taken to England. To provide for their education, he directed that his executors should place out his whole estate at interest, on landed property or in some public funds, suggesting that those of the East India Company "were perhaps as secure as any," but leaving the investment to the discretion of his executors. In a letter, proved as a codicil, he directed that, after providing for certain expenses, the whole of his property at Bombay should be invested in the Company's next good loan. By another codicil he made a specific provision, calculated first in Indian and then in English money, to the amount of 8000*l.*, for each of his daughters.

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He died in India. The executors proved the will, and there collected the funds; and having there also administered them so far as it was necessary, transmitted them to England, where suits were instituted by parties claiming interests under the will. In the progress of these suits, the accounts being taken, the amount of the funds was ascertained; and in a report made by the Master and confirmed by the Court, deductions were made from certain legacies and annuities payable in England, on account of the legacy duty, but none for probate duty, or legacies paid in India, or for the shares of residue paid there.

Upon a petition presented by the Attorney-General on behalf of the Crown, claiming these duties, held that, under the circumstances of the case, they were not payable under the statutes relating to this subject, 55 G. 3. c. 184., &c.

COLIN ANDERSON, surgeon to his Majesty's 75th regiment of foot, resident in India, and being seised and possessed of some real estate in the East Indies, and was also possessed of considerable personal estate and effects, all of which, at the time of his death, and of making his will and codicils herein-after stated, were also in India, made and published his last will in writing, bearing date the 25th day of October 1802, and thereby desired that his house and grounds in the island of Coolabah, his household furniture, horses, liquors, &c. &c. &c. might be sold at public outcry to the highest bidder, and the produce placed to the credit of his estate; and after noticing that on the 1st of January 1802, he should have assets in India to the amount therein mentioned, and that he was entitled to any other division of prize-money, which might thereafter be made for Columbo and Seringapatam, as captain and as major, Cochin prize-money, and whatever might be given to the captors of Kurree, on both which services

he was head surgeon ; and also noticing, that there was one boy at home named Colin Anderson, born on or about the 25th day of October 1788, then at school at Glasgow, and boarded with Mr. John M'Arthur Taylor there ; that there was one girl in India, named Jane Jarvis Anderson, born at Poondamalee, near Madras, on the 2d day of October 1797 ; that there was one girl in India, born at Mangalore, on the 21st day of September 1800, named Ann Nesbitt Anderson ; that there was in India, born at Coolabah on the ; to those children, or the survivors of them, and their heirs, he left the whole of his property, in equal divisions, subject to such regulations and legacies as he should thereafter mention ; and it was his wish that his brother Lieutenant Patrick Anderson, of the 19th regiment of light dragoons, should come to Bombay, as one of his executors, and take the children, then in India, to England with him ; and as that duty might put him to some expense and inconvenience, the said testator bequeathed to him 500*l*. sterling, as some kind of recompence, besides the amount of his passage home, which his the testator's executors were directed to pay ; all the expenses which might be incurred in India on account of those children, fitting them out for their voyage, the price of their passage home, and other incidental charges which were thought necessary to their comfort and safety, were to be charged to his the testator's estate ; and he thereby gave certain annuities to different persons in England and in India. To provide for those legacies, and the education of the children, his executors were thereby directed to place the whole of the estate

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securely at interest, either on landed property or in some public funds, (naming those of the India Company, as perhaps, safe as any), but he left the choice entirely to his executors, in whose regard for the interest of the children he had implicit confidence. The testator then expressed various limitations and provisions as to the property : and he thereby constituted, nominated and appointed his brothers, Alexander Anderson and Patrick Anderson, Brevet Lieutenant-Colonel Lachlan Macquarie, of the 36th regiment of foot, and Charles Forbes, of Bombay, esquire, (now Sir Charles Forbes, baronet,) executors of his will.

The testator afterwards made and signed a certain codicil or testamentary paper dated the 4th of July 1804, and addressed the same as a letter to Patrick Anderson. This paper contained the following passages : “ If I should be so unfortunate as to meet with any accident to prevent my getting to Bombay soon, you must endeavour to get leave and go home in charge of these infants ; place them at school, and be in some degree their father.” And “ If I get safe to Bombay, I expect that you will exert yourself to get leave and come down and stay with me until I go to Europe, or as long as you can.”

The testator afterwards made and signed another codicil or testamentary paper, as a letter addressed to Patrick Anderson, containing the following clause : “ After fitting out the children for the voyage, paying your own and their passage to England, and procuring bills for their expenses for the two first years, besides paying the sums I have already mentioned, and those to be mentioned hereafter, be pleased to lodge the whole of

my property at Bombay, when an opportunity occurs, in the Company's next good loan."

The testator afterwards made and signed another codicil or testamentary paper, dated on board the Candidate, off Kedgerre, the 21st of July 1804, and addressed the same as a letter to Patrick Anderson, containing the following passage: "I wish you to go home with the children, and you can endeavour to get on in the army at the same time;" and further, in the same testamentary paper or letter, he writes: "General Lake will hardly refuse you leave, when you tell him that the father of these children served his majesty thirty years, and that they are deprived of the protection and instruction of a mother, depending solely on your and their relations at home:" and he added the following statement, which was signed "Messrs. Forbes & Co., of Bombay receive the interest, half yearly, of the three notes into which the opposite of 32,000 rupees was divided, or opposed to the name of each child at nine *per cent. per annum*, until they can place it to more or equal advantage in the funds of the Honourable East India Company. I wish these sums to continue accumulating until each, progressively, shall amount to 8,000*l.* sterling; the expenses of maintaining and educating these children in the mean time to be defrayed by me or at my expense, &c." Then follows the reason for this provision and the statement.

The testator died on the 28th day of July 1804, at sea, while on a voyage from Calcutta to Bombay, without having revoked or altered his will and codicils, leaving the four children named in the will, who were all illegitimate, and all except the

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eldest were, at the time of his death, resident at Bombay.

By letters patent under the Great Seal of Great Britain, bearing date at Westminster, the 28th of February, in the thirty-eighth year of the reign of King George the Third, being the charter for establishing the Courts of Recorder at Madras and Bombay, in the East Indies, his Majesty was pleased to grant, order, establish and appoint, that the Court of Recorder at Bombay, should be a Court of Ecclesiastical jurisdiction within Bombay, and the limits thereof, and upon British subjects there residing, with the same powers, authorities, and privileges, and subject to the same restrictions as are thereinbefore given, granted or mentioned unto or as to the Court of Recorder at Madras. By this charter it was amongst other things granted, ordained, established and appointed, that the Court of Recorder of Madras should be a Court of Ecclesiastical Jurisdiction, and should have full power and authority to administer and execute within Madras and the limits thereof, and towards and upon British subjects there residing, the ecclesiastical law, as the same was then used and exercised in the diocese of London, so far as the circumstances and occasions of Madras and the people would admit or require; and for that purpose was given to the said Court full power and authority to grant probates, under the seal of the said Court of the said Recorder of Madras, of the last will and testament of all or any of the said British subjects dying and leaving personal effects within the said territories or districts respectively, and to demand, require, take, hear, examine and allow, and if occasion required, to disallow and reject the account of

them, in such manner and form as were then used or might be used in the said diocese of London, and to do all things needful and necessary in that behalf.

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In conformity with the provisions of this charter, and the orders and regulations of the Court of the Recorder of Bombay, the Respondents Sir Charles Forbes, Patrick Anderson, and Lachlan Macquarie obtained probate of the will and codicils from the Court of the Recorder of Bombay; and under the directions and authority of the will and codicils, Sir C. Forbes and his co-executors (who died before the suit) possessed the testator's house and land, and sold the same, and collected and got in all the testator's goods, chattels and effects, and converted the principal part thereof into money; and they paid all his debts and legacies, and paid the annuities given by his will as they became due, and the residue of the testator's estate which they so converted into money was invested by them in the public funds of Great Britain, in the manner hereinafter mentioned.

In the year 1805 Patrick Anderson proceeded to England with the three youngest children of the testator, and he took with him part of the testator's assets, and on the 12th of November 1811, the Respondent Sir C. Forbes, on behalf of himself and Patrick Anderson (the said Lachlan Macquarie being absent and never having intermeddled with the testator's estate and effects), and pursuant to the rules and regulations of the Recorder's Court of Bombay, rendered unto the recorder of the court an account of the administration of the testator's estate and effects by the executors, and the same accounts were examined and passed as ap-

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proved of by the court. Previous to the Respondent Sir C. Forbes's departure from Bombay for England, which was in the month of November 1811, the balance appearing by the account to be due to the testator's estate was remitted by him to Messrs. Porcher & Co. in London, as the agents and bankers of the executors, and they afterwards accounted for the same to Sir Charles Forbes; and Sir Charles Forbes and his co-executor Patrick Anderson, having administered testator's goods, invested the residue, or a principal part of such residue, in bank three *per cent.* annuities, in the joint names of Patrick Anderson, Lachlan Macquarie, and Sir Charles Forbes.

Colin Anderson, the son, attained his age of twenty-one years in the year 1809, and separate accounts were kept with him of sums paid on his account, but no distribution of the testator's residuary estate was made in the lifetime of the son, and Sir Charles Forbes continued to make payments on his account, and to maintain the other children out of the interest or dividends arising from the testator's estate.

In March 1819, the testator's daughter, Ann Nesbitt Anderson (being then an infant), intermarried with the Respondent George Jackson.

The executors did not obtain probate to be granted of the testator's will by the Prerogative Court of Canterbury or any other ecclesiastical court in England.

On the 20th of May 1819, the Respondent George Jackson, and Ann Nesbitt his wife (who died), filed a bill in the Court of Chancery in England against Sir Charles Forbes, Colin Anderson (since deceased), and Caroline Erskine Anderson,

afterwards the wife of the Respondent Thomas Faulkner Middleton, but since deceased, and also against Lachlan Macquarie (who was then out of the jurisdiction of the court and since deceased), thereby stating the will and codicils partly to the effect hereinbefore set forth, and otherwise referring to the circumstances hereinbefore stated, and erroneously stating that the Respondent Sir Charles Forbes had duly proved the same in the Prerogative Court of the Archbishop of Canterbury in England, and stating that in March then last, a marriage was solemnised between the Respondent George Jackson and Ann Nesbitt Anderson, and that previously to and in consideration of such then intended marriage, and for the purpose of making a settlement of the property of Ann Nesbitt Anderson (it being uncertain what was the extent and nature of the interest which she was entitled to under the will and codicils of the testator), certain articles of agreement were made and entered into, bearing date the third day of March 1819, to the effect therein stated, the bill prayed that the rights and interests of the Respondent George Jackson, and Ann Nesbitt his then wife, in right of the said Ann Nesbitt Jackson and of all parties to and in the residuary estate and effects of the testator, might be ascertained and declared by the court, and that the share and interest of Ann Nesbitt Jackson might be transferred into the names of the trustees of the marriage articles, upon the trusts of the marriage articles; and if necessary, that accounts might be taken of the estate and effects of the testator, and of his debts, and the legacies and annuities given by his will; and that such residue, and the share

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of Ann Nesbitt Jackson thereof might be ascertained, and an account taken of the dividends of the share of Ann Nesbitt Jackson therein, which had accrued due, and that the same might be paid to Respondent George Jackson, and that all proper accounts might be taken and directions given, &c.

The Defendants to the original bill, except Lachlan Macquarie, appeared and put in their answers thereto, and the Respondent Sir Charles Forbes, by his answer, admitted that the will and codicils were proved in the Recorder's Court of Bombay, but did not by his answer admit or deny that he had proved the same in the Prerogative Court of the Archbishop of Canterbury; and after stating the amount and disposition of the testator's estate and effects, said he was unable to determine the rights and interests of Ann Nesbitt Jackson, and the other persons interested under the will and codicil of the testator, and he therefore claimed the direction of the court in that respect, and submitted to act as the court should direct.

The cause came on to be heard before his Honour the Master of the Rolls, on the 25th of April 1820, when the usual decree to take the accounts was made, and the consideration of all further directions, and of the costs of the suit, was reserved until after the Master should have made his report.

The executors made various payments out of the testator's estate, to Colin Anderson, the son, in respect of his share thereof, and also divers payments towards the support and education of the testator's daughters, by which means the bank annuities became eventually reduced to 36,000*l.* bank three *per cent.* annuities.

After the order or decree of the 25th of April

1820, was made, Lachlan Macquarie came within the jurisdiction of the court, and he was brought before the court as a Defendant, by supplemental bill.

After the aforesaid proceedings had been had in the cause, Caroline Erskine Anderson, with the approbation of the court, intermarried with the Respondent Thomas Faulkner Middleton, and articles for a settlement were thereupon entered into with the approbation of one of the masters of the Court of Chancery, and the Respondent George Jackson, and his said wife, having had two children, namely, the Respondents George Jackson Jackson; and John Anderson Jackson, George Jackson and Ann Nesbitt his wife, in or as of Hilary Term, 1823, filed their supplemental bill against the said Thomas Faulkner Middleton, and Caroline Erskine his wife, and the trustees of the marriage articles, and also against George Jackson Jackson and John Anderson Jackson, for the purpose of bringing the said several parties before the court, and the last-mentioned supplemental cause having come on to be heard, the usual decree was made.

On the 25th of October 1824, the master, to whom the original and several supplemental causes stood transferred, made his general report, whereby he found that no creditor had come in to prove any debt, and that the legacies were all paid, and he found that the Respondent Sir Charles Forbes, and Patrick Anderson, by virtue of the probate granted in India, collected and got in the testator's effects in India, and administered the same in India jointly, until the 14th of February 1805, when Patrick Anderson, pursuant to the directions contained in the will and testamentary papers of:

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the testator, proceeded with the three female children of the testator to England; and that Sir Charles Forbes continued in India and administered the estate and effects of the testator in India, and collected and got in such parts thereof as were not taken by Patrick Anderson with him to England; and that on or about the 12th of November 1811, the Respondent Sir Charles Forbes, on behalf of himself and Patrick Anderson, pursuant to the rules and regulations of the Recorder's Court at Bombay, rendered an account of the administration of the testator's estate and effects in India, which account commenced on the 1st of August 1804, and ended on the 31st of August, 1811, and the master adopted and allowed an official or notarial copy thereof, as an account of the administration of the testator's estate in India, and the balance of which, amounting to the sum of 2407*l.* 12*s.* 7*d.*, was accounted for as a receipt in England, on the 23d of January 1813, and as such was included in the first schedule to the report under that date; and the master, after stating the receipts and payments of the executors, and other matters as therein stated, certified, that the clear residue of the testator's personal estate then consisted of the sum of 36,000*l.* three *per cent.* consols, standing in the names of Patrick Anderson, deceased, Lachlan Macquarie, deceased, and the Respondent Sir Charles Forbes, and of the sum of 30,683*l.* 0*s.* 5*d.* then due from the Respondent Sir Charles Forbes, subject, &c.

The legacy of 50*l.* to Patrick Anderson, and the legacy of 50*l.* to the Respondent Sir Charles Forbes, and the legacy of 50*l.* to General Macquarie, and the legacy of 50*l.* to Alexander Anderson, and the

value of a lieutenancy to Colin Anderson the son, viz. 564*l.* 2*s.* were allowed as disbursements to Sir Charles Forbes, and the legacy duties on such legacies, and also on the value of the annuities to Margaret Thompson, and to Archibald Anderson, Isabel Thompson, and Isabella M'Dougall, in the will mentioned, were also allowed as payments by the master, in the second schedule to his report, but no other payments in respect of the legacy duty were claimed or allowed.

Colin Anderson, having attained twenty-one, and afterwards died intestate and illegitimate, the Attorney-general was brought before the court by supplemental bill in respect of the interest of Colin Anderson in the trust funds : and Jane Jarvis Anderson, having also died intestate and without issue, letters of administration to Colin Anderson the son, and Jane Jarvis Anderson, limited to the purposes of the suit, were granted to the Respondent John Hopton Forbes.

Ann Nesbitt Anderson, who had intermarried with the Respondent George Jackson, afterwards died, leaving several children, and having made a will, and a bill of revivor and supplement was filed to revive the suit, and make her children Defendants.

On the 7th day of July 1829, the Respondent George Jackson, the Respondents Thomas Faulkner Middleton, and Caroline Erskine, his late wife, and the infant Respondents George Jackson Jackson, John Anderson Jackson, Ann Jackson and Jane Jackson, presented their petition to the Master of the Rolls, in all the causes, stating as thereby appears, and praying payment of certain advances for maintenance of Anne Nesbitt Jackson and

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Caroline Erskine Middleton, and of their shares of the trust funds, and for enquiries as to their subsequent maintenance, and also the maintenance of the children of Anne Nesbitt Jackson.

On the 17th day of July 1829, the three first mentioned causes came on to be heard before the Master of the Rolls for further directions, and as to the matter of costs reserved by the decree, the petition, and the supplemental suit coming on to be heard at the same time, his honour ordered references to the master to inquire what sum ought to be set apart to answer annuities given by the will, and after declaring what interests the parties took under the will, his honour declared that while all the residuary legatees continued under age and unmarried, the residue of the testator's estate formed an aggregate fund out of the interest whereof they were to be maintained and educated, and that the surplus interest, after paying the expenses of their maintenance and education, was to be invested and added to the principal for the benefit of the persons who should be eventually entitled thereto: and that Colin Anderson the son, upon attaining his age of twenty-one years, became absolutely entitled to one-fourth part of the aggregate fund and all subsequent interest and accumulations thereof. The decree then proceeded to make declarations and give minute directions as to the remaining three portions of the residue.

In pursuance of this order, the master to whom the causes stood referred made a separate report, bearing date the 1st day of December 1829, and thereby certified that it appeared by the accounts annexed to the examination of the Respondent Sir Charles Forbes, therein referred to, (and which

accounts were adopted by the master's general report, dated the 22d of October 1824, and absolutely confirmed,) that the aggregate of the funds, with the surplus and accumulated interest which constituted the clear residue of the testator's estate, on the 31st day of December 1822, (the end of the year in which Colin Anderson the younger died) consisted of 36,000*l.* bank three per cent. annuities, and of the sum of 23,974*l.* 14*s.* 1*d.* cash in the hands of the Respondent Sir Charles Forbes, subject, however, to deduction as therein mentioned. And the master, upon the calculation, and for the reasons therein set forth, certified that the sum then due to his majesty, as representing Colin Anderson the younger, for his share of the testator's estate, was the sum of 12,000*l.* three per cent. consolidated bank annuities, being one-third of the sum of 36,000*l.* like annuities, part of the clear residue of the testator's estate; and that the same was subject to the payment of the sum of 577*l.* 17*s.* 7*d.* to the testator's estate, and to one-third of the annuity of 50*l.* to Margaret Thompson, and costs of the suits.

By an order dated the 21st day of May 1830, among other things 12,000*l.* was directed to be carried over to an account to be entitled His Majesty's Account, and directions were thereby given as to the deductions thereout, and for the costs of the Attorney-general, but the order was to be without prejudice to any question as to whether the residuary estate of the testator Colin Anderson was liable to legacy duty.

After the decree, Caroline Erskine Middleton died, having had two children, both of whom died in her lifetime, but administration to them was taken

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by their father, the Respondent Thomas Faulkner Middleton, and he filed a bill claiming to be entitled to the share of his wife in the testator's residuary estate.

In the month of October 1830, the Attorney-general presented a petition in the causes, praying that it might be declared that his Majesty was entitled to be paid the amount of the probate duty, and of the legacy duty upon the whole of the testator's estate and effects, which were brought or remitted to England, or administered or remaining to be administered in England, and praying the necessary directions for the raising and paying the amount due to his Majesty in respect of the probate duty and legacy duty.

The Respondent Sir Charles Forbes, and other parties in the cause, at or about the same time presented a cross petition in the causes, praying that the Attorney-general's petition might be dismissed, and that it might be declared that the executors were not required by law to have obtained probate in this country, and that the testator's estate was not liable to probate duty, and that the residuary estate of the testator collected, and alleged to have been appropriated in the East Indies, was not liable to duty chargeable upon legacies, annuities, and shares of residue under the Acts of Parliament now in force, touching testator's estate, got in and distributed under probates of wills granted by the Ecclesiastical Courts of this country.

The two petitions came on together to be heard before the Lord Chancellor on the 16th of February 1831, when his Lordship ordered that a case should be made for the opinion of his Majesty's Court of Exchequer as to the questions raised by the petitioners.

In pursuance of the order a case was agreed upon and stated for the opinion of his Majesty's Court of Exchequer, setting forth the matters hereinbefore stated, and each party was to be at liberty to refer in the argument to the testator's will and codicils, or the probate thereof, or any other document or any proceeding in the causes mentioned in the case.

There were three questions raised by the case for the opinion of the Court of Exchequer, the two first of which related exclusively to the claim of probate duty, and were not insisted on by the crown in this particular case, when the case was argued; the third question raised by the case was as follows:

“ Whether the duties chargeable upon legacies,
 “ annuities and shares of residue, under the Acts
 “ of Parliament in force touching such duties, upon
 “ testators' estates administered in England, were
 “ and are chargeable in respect of all or any and
 “ which of the legacies, annuities and shares of
 “ the residue, respectively bequeathed by the tes-
 “ tator's will and codicils?”

The Judges of the Court of Exchequer were attended with such case, and the same was in Easter Term 1832, argued before them by counsel on behalf of his Majesty's Attorney-general and of the Respondents, and upon such argument the two first questions having been waived, the argument was confined to the third question only.

After hearing the arguments*, the Judges of the Court of Exchequer certified to the Lord Chancellor that the case had been argued before

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* See *Jackson v. Forbes*, 2 Crompt. & Jerv. 382. 2 Tyrwhitt, 354.

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them by counsel, that they had considered it, and were of opinion that the duties chargeable upon legacies, annuities, and shares of residue, under the Acts of Parliament in force touching such duties, were not chargeable in respect of any of the legacies, annuities, and shares of such residue, bequeathed by the said testator's will and codicils.

By an order of the Lord Chancellor bearing date the 18th of July 1832, made on the petition of the Respondents, it was ordered that the petition of his Majesty's Attorney-general should be dismissed, and it was declared that the legacies, annuities, and residuary personal estate of the testator, Colin Anderson, were not liable to duty chargeable upon legacies, annuities, and shares of residue, under the Acts of Parliament now in force touching testators' estates got in and distributed under probates of wills granted by the Ecclesiastical Courts of this country.

Against the order dismissing the petition this appeal was presented.

For the Appellant, the *Solicitor-General* and Mr. *Wray*.

By the true construction of the Acts of Parliament by which legacy duty is chargeable upon property of deceased persons administered and distributed in this country, and by the true construction of the testator's will and codicils, regard being had to the facts and circumstances of this case, the legacies and annuities upon which such duty has already been paid were, and the residuary estate of the testator now is, under the circumstances in which the same were secured, administered, and paid to the parties entitled thereto, liable to the duties chargeable by the several Acts

of Parliament in force, and applying to those matters.

The legacy duty attaches on personal estate administered in England, if it is the property of a British subject, wheresoever he may die. It has been held that this rule does not apply to foreigners.* So far as the estate in this case was administered here it became liable to the duty. That it was so administered appears by the proceedings in the suits in Chancery. The payments were made under the authority of the decree. The language of the act † by which the duties are granted is general, and applies to every executor who acts and administers the estate in Great Britain. The fifth section expressly includes all his Majesty's subjects. The sections bearing on the question are the 2d, 5th, 6th, 7th, 27th, 28th, 32d, and 33d. The property even of a foreigner domiciled in Great Britain is liable to the duty.‡

The authorities are decisive of the question. The *Attorney-General v. Cockerell*§ is in all its parts like this case, except that the surviving executor took out probate in Great Britain. In the *Attorney-General v. Beatson*||, the legacy duty was held to attach upon property remitted from India, although it was only *in transitu* to Scotland. In *Logan v. Fairlie*¶ the residue was held liable to duty, although probate was granted abroad, and the money remitted by the executor for payment, because a suit here was necessary to perfect the administration.

* Re Bruce, 2 Cr. & J. 436. S. C. 2 Tyr. 475.

† 36 G. 3. c. 52. See sect. 6. and 55 G. 3. c. 184. Sched. pt. 3.

‡ Re Ewin, 1 Cr. & J. 151. S. C. 1 Tyr. 91.

§ 1 Price, 165, || 7 Price, 560. ¶ 2 Sim. & Stu. 284.

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If the administration is perfected abroad, and nothing remains to be done but to hand over the legacy or residue, it is not liable to duty; but if it is not yet fully administered, and the legacy remains to be severed from the general estate, or the accounts to be taken, and the residue ascertained and divided, the duty to the crown accrues. Even where foreign funds were transferable to parties abroad, and the dividends payable in foreign countries, being the property of a testator domiciled in England, and administered by an executor here, the legacies were held liable to the duty.* It was supposed in the Court of Exchequer that the fund was administered in India; if so the proceedings in Chancery here were throughout erroneous. The court in Bombay, where probate was taken out, is a court for probate only. The property having been collected in India by virtue of that probate, was transmitted to England for the purposes of administration, and the suits were prosecuted for that purpose. The rights of the legatees were ascertained and enforced in England. What is that if not administration?

For the Respondents — Sir *Charles Wetherell* and Mr. *Garratt*.

In the *Attorney-General v. Cockerell* the will was proved in England. Not so here. The same distinction occurs in the case of the *Attorney-General v. Beatson*. The decision in *Logan v. Fairlie*† was grounded upon those two cases. But the Master of the Rolls says in that case, “If a testator die in India, and his personal estate be wholly in India, and his executor be resident

* 1 Price, 165. Re Ewin, 1 Cr. & J. 151.

† 2 Sim. & Stu. 291.

"there, and the will be proved there, and the executor remit to a legatee in England, &c. the amount of his legacy, the duty is not payable upon such remittance," &c.* There was no ground for obtaining probate here, nor is it granted except where the property lies within the diocese. The cases of *Daniel v. Luker*†, and *Yockney v. Foyster*‡, shew that courts of equity have jurisdiction over the estates of a testator, without probate or letters of administration. Whether the legacy is paid directly by the executor or through the administration of the Court of Chancery, cannot make any sound distinction as to the law affecting the case.

In reply — In *Logan v. Fairlie* probate had not been taken out in England, yet it was held that the estate was chargeable with the legacy-duty.

The *Lord Chancellor*.§ — In this case the question originated in a proceeding in the Court of Chancery. The case on the part of the Crown was made incidentally, one of the parties being a natural child of the testator: the question was then raised as to the right of the Crown to the legacy duty on the fund supposed to have been administered in this country, but belonging to the

* He adds afterwards, "As the whole estate is administered in India, and the remittance is in respect of a demand which is to be considered as established there. But if part of the assets is found in England in the hands of the agent of such executor, without any specific appropriation, and a legatee in England institute a suit here for the payment of his legacy out of such unappropriated assets, then such assets are to be considered as administered in England, and the legacy-duty is payable."

† 3 Dyer, 305.

‡ Cited in *Scarlett v. B. of London*, 1 Hagg., 631.

§ At the conclusion of the argument.

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testator in India, and locally at that time there, and there having been no probate in this country. That question coming before me in the Court of Chancery, I deemed it a fit one (and all parties concurred in the propriety of the course taken) to send it for the opinion of the Court of Exchequer; because it was, strictly speaking and exclusively, a question upon the construction of an act of parliament or acts of parliament, and therefore in no sense whatever equitable matter, or connected with equitable matter. It was by accident only that the Court of Chancery had jurisdiction over it, or interference with any thing relating to the matter; for it was entirely a point of law. If it was clear that a case should have been sent for an opinion of a court of law, as being a legal question merely, the peculiar nature of that question made it equally clear to what court of law the case ought to be sent, that it ought to be sent to the Court of Exchequer, his Majesty's high revenue court, which has the greatest experience and familiarity with questions of this description. Accordingly, the case having been stated, and sent with the concurrence of the parties, and the Court of Exchequer, having heard the argument on the facts stated, came to a decision which your Lordships will find reported in Mr. Tyrrwhit's Exchequer Reports. The Judges certified without any reasons, as is usual in such cases; the grounds of that decision therefore we do not see. The continuance of this practice of certifying without reasons I trust will not be very long, the disapprobation of that practice having been very universal in the profession, and discontent having been more

than once expressed by Courts of Equity, to which certificates of opinions of the courts of common law have been from time to time sent for a great number of years. It was certified that the Crown was not entitled under the circumstances.

When we come to examine the reasons on which the decision may be founded, they appear, on the construction of the act of parliament, and on general principles, to be perfectly maintainable; but they do also appear, (it is admitted,) to be not with great facility, nor yet very readily reconcilable with one or more decisions of that same Court, and more particularly the case of the *Attorney-General and Cockerell*, and two others. I confess I find it more difficult to reconcile those cases with the acts of parliament and principle, than I do find it difficult to reconcile these to the opinion of the Court of Exchequer in this case. But as there has been an apparent discrepancy in the course which the Court has taken in dealing with questions of this description, I should recommend to your Lordships, out of deference for the former decisions of that Court, rather for the present to postpone coming to an ultimate decision until you have had more opportunity of looking into those other authorities; for it is to be observed that all these authorities, with one exception, were cited before the Court in the course of the argument. The attention of the Court, before it came to the opinion now appealed from, was distinctly drawn to these cases and the discrepancies between them. In the argument on the part of the Respondent in the court below, these discrepancies were fully pointed out to the Court. It

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was not, therefore, from overlooking these prior cases that the Court formed its opinion, but it was either from disregarding those authorities, or from the impression on the minds of the Judges of the Court of Exchequer, that they were not reconcilable with the case at present before the House. And it is to be observed, that a very cursory view, a slight comparison indicates that there is one very material distinction, which distinction has been pointed out by both the learned counsel for the Respondents.

When the case came back to me from the Court of Exchequer, to which I had sent it, I have no recollection whether it was again argued in the Court of Chancery; I rather think it was not; I rather think I intimated an opinion that my view of the question coincided with the opinion of the Court of Exchequer, and I think I referred to some remarks which I had flung out when the case was sent thither, in which I indicated my opinion, expressing at the same time an intimation that my opinion might come here to be corrected. That is rather the impression upon my mind, although I have no very distinct recollection on the subject: but at all events I am quite certain that I had this present in my mind, and it operates on my opinion at this moment, after all I have to day heard, and after all the authorities that have been cited, that it would require very strong reasons, it must be a very clear difference of opinion from that which has been certified, though without reason, from the Court of Exchequer, that would induce me, sitting in the Court of Chancery, and having had that opinion on a mere point of law, and on a point of revenue law, coming back from that revenue Court

of Exchequer, it would be after long consideration and on forming a very clear opinion, differing from them, and that they were wrong, that I should be disposed to follow a contrary course from that which had been pursued by that Court in coming to its opinion.

This decision of mine, and the opinion of the Court of Exchequer, are now brought under your Lordships' review, and undoubtedly, on the authority of the Court of Exchequer, certifying their opinion, without any partiality of feeling, in favour of the opinion come to by me, (for I feel none, and should have wished your Lordships to treat it without any kind of ceremony if you thought I was wrong in agreeing with the Court of Exchequer,) I shall strongly urge your Lordships to adopt that view on which my coincidence with that Court was founded, namely, that nothing less than an unhesitating conviction that the Court of Exchequer was wrong, should induce your Lordships to reverse, or would alone justify your Lordships in reversing a decree which, though nominally the decree in equity, is in reality a judgment of the revenue Court of Exchequer, on a purely revenue point of law. With these observations I leave the case, in the expectation that your Lordships will coincide with me, that it is fit that this case should stand over some short time before your Lordships come ultimately to a decision.

Lord Plunkett. — After what has fallen from my noble and learned friend, I do not think it would become me, as this matter is to undergo further consideration, to throw out any intimation of any opinion of mine upon the case; I shall feel it to be my duty, between this and the time when your

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Lordships come to decide on the question, to examine very carefully the various cases that have been cited as standing in opposition to the judgment of the Court of Exchequer. It is alleged that this claim is founded on the principle, that when property, though Indian property, comes to be administered in this country, it is subject to the operation of this tax: whether that reason is established in each and every of these cases, whether some modification of that principle may not have been introduced, and some special circumstances relied on, may be matter deserving serious consideration. If your Lordships did not find in any of these cases that the general principle has been acted on without those other circumstances being taken into consideration, it would go far to make one entertain some degree of doubt on the soundness of such a principle. I do not mean by what I am throwing out to intimate that the principle may not have application, or that the application of that principle may be shaken by the peculiar circumstances which distinguish this case. I shall look at it with great anxiety before I give an opinion.

9th June.

The Lord Chancellor.—This case arose upon the construction of the legacy act, with respect to the charging of the legacy duty upon certain funds of the testator, who made his will and died in India; and as the question that was raised before me was a matter of mere law and a matter of revenue, I sent it to the Court of Exchequer, and the Judges of that court, after hearing arguments upon the case, and considering all the authorities cited at the bar, certified, as is the usual practice (though I hope a practice that will soon

cease), without reasons to the Court of Chancery, which certificate of their opinion I received, and upon that ground I decided the cause. That opinion was, that under the circumstances of this case the legacy duty was not payable; that in short this case in its circumstances was not within the operation of the act.

When the case was argued here, I stated to your Lordships that it would have required a very strong opinion indeed, and a very clear opinion on the part of any Judge sitting in the court in which I have the honour of presiding, to have induced him to decide a cause contrary to the clear and unanimous opinion in a revenue case, on the construction of a revenue act, of the highest revenue court in this country. I saw no reason whatever of a nature to justify more than the entertaining a doubt upon the subject. That it was wholly free from all doubt, that I was entirely and *ex omni parte* satisfied with the judgment certified by those learned Judges, and certified to me without the reasons and the grounds whereon that judgment was founded being given, I will not now take upon me to say. Being ignorant of those reasons, I saw that there was an apparent conflict between the decision to which their Lordships had come and one or two former cases of the same court, and therefore when the case came before me in the Court of Chancery, I can only say, that whatever doubt might be raised in my mind by the comparison of these authorities, whatever darkness I might be left in as to the grounds of the decision to which the Judges of the Court of Exchequer has come, nevertheless, in deference to that decision, and seeing no grounds strong enough to

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rebut whatever might be their reasons, and seeing nothing clear enough on the opposite side to entitle me to differ from such an authority upon such a question, I felt bound by it and decided accordingly.

In consequence, however, of the conflict of these former cases and authorities with the decision in this case, it very naturally came by appeal before your Lordships, and was argued at great length by the learned counsel. I had then the valuable assistance of a noble and learned friend, the Lord Chancellor of Ireland, who considered the authorities, and I hold in my hand his own opinion delivered upon these authorities which, with his acute and discriminating mind, underwent discussion by him, and he holds, as I do, that they are clearly distinguishable from the present; that neither in the case of the *Attorney-General v. Cockerell**, nor any of the other cases, were the facts such as to entitle us to say that they are precisely in point with this; and that, consequently, there is no conflict in reality between those cases and the present. In the *Attorney-General v. Cockerell*, the will was proved in the Prerogative Court of Canterbury, and the party assumed, as the judgment of the Court states, the character and duty of executor of the will of a Mr. Robertson. In the *Attorney General v. Beatson*†, the Defendant proved the will in England; and in the matter of *Ewin*‡, the will was made and proved in England, and the only point decided was, that assets which were in foreign funds were liable to the duty in this country.

Upon all these grounds, and having this concur-

* 1 Price, 165.

† 7 Price, 560.

‡ 1 Crompt. & J.

rence of my noble and learned friend, who has paid very great attention to the question (and who has given me a long and elaborate written opinion upon the subject), I will now simply state further, that in affirming this judgment in the peculiar circumstances of this case, it does not, I apprehend, over-rule any of the former cases upon this subject, on account of the difference to which I have adverted between those cases and this. There is no conflict between them; at least this case stands upon one set of particular circumstances, and those upon other particular circumstances, and therefore I do with the most entire confidence now call upon your Lordships to affirm the decision of the Court below. Of course it is not a case for any costs.

Judgment affirmed.

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WILLIAM HOPE, JAMES WOOD, and } *Respondents*.
JAMES BRIERLY . . . }

M., a merchant, domiciled in England, died, having made his will and leaving a large personal estate, partly situate in England and partly in the United States of North America. The executors appointed by his will, who were also domiciled in England, upon obtaining probate paid a duty to the Crown limited to the value of the effects in England, but proceeded to collect and administer all the personal estate of their testator both in England and in America.

Upon an information filed by the Attorney-General on behalf of the Crown, making these allegations, and claiming probate duty upon the whole personal estate, and a general demurrer to that information, held that the probate duty was not payable upon that part of the effects which was in America.

ON the 9th day of March, 1832, his Majesty's Attorney-General filed an information (which was afterwards amended) on the equity side of his Majesty's Court of Exchequer, against the Respondents, thereby stating, amongst other things, to the effect following:—

John Marshall was for many years previous to, and at the time of his death, resident and domiciled in England, and had no other place of residence or domicile. He was a merchant trading with North America, and at the time of his death was possessed of or entitled to very large personal

estate and effects, amounting together to 300,000*l*. and upwards, part of which personal estate and effects was, at the time of his death, situate in this country, or on the high seas, and the residue thereof was, at the time of his death, situate in North America, and consisted partly of goods and effects belonging to him, and which had been sent by him to North America for sale, and were then remaining in the hands of his agents and unsold at New York and elsewhere in North America; and partly of book debts and other simple contract debts due and owing to him from divers persons at the time of his death, domiciled and resident in North America; and partly of monies in the public funds or stocks of the United States of North America, and in the funds or stock of the State of New York, in North America, standing partly in the name of John Marshall and partly in the name of his agent there.

John Marshall made and published his will, and a codicil thereto, bearing date respectively the 22d day of August, 1823, and the 15th day of May, 1824, and he appointed the Respondents, William Hope, James Wood, and James Brierly, executors of his said will and codicil. The testator died on or about the 19th day of July, 1824, without having altered or revoked his will or codicil as to the appointment of executors; and the executors, on the 28th day of September, 1824, applied for and obtained probate of the will and codicil in the proper Ecclesiastical Court in this country, for the purpose of administering the whole of the testator's personal estate and effects, or so much thereof as required probate for the purpose of being administered by the executors, and as being the proper

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Sir WILLIAM HORNE, Knight, His } *Appellant*;
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probate for that purpose; and the executors paid for duty on such probate the sum of 675*l.* only, and a stamp was impressed on the probate for that amount and no more. The duty so paid by the executors on such probate was in respect only of such part of the testator's personal estate and effects as was at the time of his death situate in this country or upon the high seas, and which was under the value of 50,000*l.*; and the executors never applied for or obtained probate to be granted by any other Court of Jurisdiction, and never applied for or obtained any other probate than the probate hereinbefore mentioned.

The executors, by virtue of such probate, proceeded to collect and administer, and in fact collected and administered in England, the whole of the personal estate and effects of the testator, whether situate in England or elsewhere, at the time of the testator's death, or the principal part thereof, to the amount of 300,000*l.* and upwards.

The executors never applied to the commissioners of stamps to pay, and never paid any further duty in respect of the testator's estate and effects, in addition to the duty which they so paid, as aforesaid, and which duty was sufficient only to satisfy the debt owing to his Majesty in respect of the probate duty upon such part of his personal estate and effects as was, at the time of his death, situate in England or upon the high seas, and was wholly insufficient to satisfy any duty upon such part of the personal estate and effects of the testator as was, at the time of his death, situate in North America. All the executors, at the time of the testator's death, and at the time when they took out and obtained such probate as aforesaid, were

resident and domiciled in England, and ever afterwards continued to reside and were domiciled in England.

The information prayed that it might be declared, that a debt arose and became payable to his Majesty in respect of probate duty upon the whole amount of the personal estate and effects of the testator, including as well the personal estate and effects of the testator, which, at his death, were situate in England or upon the high seas, as the personal estate and effects which were then in America; and that such debt, in respect of the personal estate and effects of the testator, which, at his death, were in America, was payable by the Respondents to his Majesty, and that the same ought to be paid out of the testator's personal estate and effects, or otherwise by the Respondents personally, and that the necessary accounts might be decreed to be taken of the testator's personal estate and effects, which, at his death, were situate in America, and of the amount of duty which accrued due to his Majesty for probate duty upon the probate, which ought to have been taken out in respect of such personal estate and effects; and that the Respondents might be decreed to pay the amount of duty which, upon taking such accounts, should appear justly due and owing to his Majesty; and that the Respondents and each of them might be restrained by the injunction of the Court of Exchequer from further administering the testator's estate and effects, or from intermeddling therewith, until the duty should be ascertained and paid; and, if necessary, that a receiver might be appointed of the outstanding personal estate and effects of the testator, with all proper directions;

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and that the Respondents might be decreed to pay the costs of the suit.

The Respondents appeared to the information, and on the 21st day of May, 1833, and filed a general demurrer thereto. The demurrer was set down for argument, and came on to be heard before the Judges of the Court of Exchequer, at Westminster, in Trinity Term, 1833, when their Lordships, by an order dated the 3d day of June, 1833, allowed the demurrer.

The appeal was against this order.

For the Appellant — The *Attorney-General* and Sir *George Grey*.

By the true construction of the acts of parliament by which probate duty is chargeable upon the personal estate and effects of deceased persons for or in respect of which probate shall be granted, such duty is chargeable and ought to be paid upon all the personal estate and effects of a testator wherever situate at the time of his death, when probate is granted in England, and which are collected and got in by such executors, and are administered in England by them under the probate.

In this case the executors having taken possession of the whole of the personal estate and effects of the testator, and having administered the same in this country under and by virtue of the probate, the whole of such personal estate and effects, including so much thereof as was situate in America at the time of the testator's death, must be taken and considered as the personal estate and effects for or in respect of which such probate was granted, and therefore liable to probate duty.

The Respondents not having paid probate duty upon, or rendered an account of any part of the

personal estate and effects of the testator, which were at the time of his death situate in North America, and which the Defendants, by their demurrer, admitted to consist partly of book debts and other simple contract debts, as alleged by the bill, such demurrer ought not to have been allowed, but his Majesty's Attorney-General was entitled in respect of such particulars, at least, to a discovery by way of answer, and to an account or inquiry as to such particulars by the Decree of the Court.

As the information alleges that the assets were obtained in England by virtue of the probate in England, the allegation is admitted by the demurrer. Suppose the funds had been first transmitted from America, and then the probate taken out, could it have been contended that they were not liable to the probate duty, because they were not within the diocese at the death of the testator? The case of *Logan v. Fairlie* does not apply in circumstances, because the funds were in India and the probate was taken out there, the testator died, and the executors resided there. But the principle of that decision is in favour of the Appellant, for in this case all the proceedings and transactions were in England. The fund alone was in America, and it was administered under the probate. There is no authority to show that the ordinary is not intitled to grant probate as to property beyond his diocese. There must be some person to administer the property of a testator or intestate. It forms part of his personal estate wheresoever situate, and therefore belongs to the jurisdiction of the ordinary. The executor obtains possession by means of the probate, and therefore must pay duty. His right of administration can-

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not go beyond the amount of duty which he has paid on the probate: *Carr v. Roberts*.*

For the Respondents, — *Mr. Rolfe* and *Mr. Wigram*.

The probate duty is not payable unless the property to be administered is in England, otherwise if it is in a foreign country. The grant of probate by the ordinary originated in the claims of the church upon the property of persons dying without will. Where the property was disposed of by will, a compensation was made to the ordinary for his claim. If probate duty must be paid on property in a foreign country, it may be paid twice upon the same fund. The doctrine, that an executor cannot sue beyond the amount he has paid for probate duty, does not stand upon any satisfactory authority: *Hunt v. Stevens*† is the foundation case, and will not stand the test of examination. The duty, according to the obvious construction of the words of the Stamp Act, is imposed in respect of property in England. Suppose a suit brought by an executor for 1000*l.*, and the probate duty paid was only 500*l.*, and the other 500*l.* is trust money: how is the fact to be ascertained? Can it be tried collaterally, or must it appear by affidavit upon motion for a new trial? The case is ruled by the *Attorney-General v. Dimond*‡, and *Ewin's case*.§ The question as to legacy duty depends upon the domicile; and there is no distinction in principle as to the probate duty. In ancient times each ordinary took what was within his own diocese.

In reply. — The authorities of *Ewin's case* and

* 2 B. & Ad. 905.

† 3 Taun. 113.

‡ 1 Cr. & J. 356. 1 Tyr. 243.

§ 1 Cr. & J. 151. 1 Tyr. 91.

Dimond's case stand only upon *obiter dicta*, and in effect they are now *sub judice*. The question is, in respect of what property is the probate applicable? That it was in America at the testator's death, and received or administered here afterwards, can make no difference in principle. This judgment cannot be supported, unless the former authorities are overruled: *Logan v. Fairlie*; *Low v. Fairlie*; *Attorney-General v. Cockerell*.

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*The Lord Chancellor.**—In considering this case, July 25. which comes by appeal from a decision of the Court of Exchequer, it is necessary I should remind your Lordships, as I did on a former occasion, of the case of *The Attorney-General v. Jackson*. This is a decision by a Court entitled to the greatest respect, not merely in reference to matters which more ordinarily come before the Courts of this country, but in reference particularly to matters of revenue, inasmuch as the jurisdiction which the constitution and the law of this country has given to that court leads them especially to the handling questions of this description. It was upon such ground that I felt, though there were certain doubts in my mind on a comparison of the cases of *The Attorney-General v. Cockerell*, *The Attorney-General v. Beatson*, and other cases, with the decision of the Court in *Forbes v. Jackson*, which was a case from the Court of Chancery, that it must be, as I stated, a very clear opinion, and one very confidently entertained, and without any hesitation, that should entitle me, and therefore incline me, to advise your Lordships to differ from that Court on a solemn judgment delivered after hearing all the arguments which could be urged on

* At the conclusion of the argument.

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both sides. Nevertheless, your Lordships are bound in this, as in all other cases, to judge for yourselves, as the Court below were bound to judge for themselves; and if, on serious consideration, I cannot bring my mind to think that they have well decided this case, it will be my duty to represent that result to your Lordships. I shall, therefore, take time to consider the arguments which have been urged, to examine the statutes and the authorities, and to make inquiry of the very learned Judge at the head of the Ecclesiastical Courts upon some matters which have been brought into discussion in argument here, but which do not appear to have been touched upon in the Court below. It is not a very elaborate judgment; nevertheless, the question is put in the mode of stating it on its right footing. The learned Chief Baron not taking the very words of the schedule and clauses of the act of parliament, but, in giving judgment, which I understand to have been delivered, after taking time to consider, lays it down (and that is clearly right) that the whole question is, whether, in respect of the 300,000*l.*, or any portion of that amount, a probate was granted. If it was granted in respect of that money *cadet quæstio*, clearly probate duty is payable: if it was not granted in respect of that money, the question is at an end on the other side, the duty is not payable.

The learned Attorney-General agrees that this was the right way of putting the question; but he attempts to limit the decision by the pleadings, and to make this decision in the affirmative of that which is alleged, but which would not decide the general question; that would still be left open to argument, although this probate was allowed to be granted in

respect of the property in question. He has recourse to an argument in which I do not go along with him, though I do in a great deal of his argument as to the locality or non-locality, and the shifting nature of personal property in general. He says, Look at the information, and you will see the demurrer confesses the facts; you will see that by the information it is alleged, and therefore by the force of the demurrer must be taken to be admitted, that it was in respect of this probate, or by force and effect of it, that possession was obtained by the party of this American fund; therefore, says he, it follows that the probate was granted in respect of that foreign fund. I do not concur in that view of the case: it may very easily be conceived that the probate was granted in respect of goods and chattels locally situate within the bounds of the Ecclesiastical jurisdiction, and in respect of nothing else. The probate granted, and to that limited extent granted here by the Court, may have been used elsewhere for another purpose, and with respect to other property out of the Ecclesiastical jurisdiction; and by means of probate granted *alio intuitu* by the Ecclesiastical Court, by a use being made of it elsewhere, the possession of the estate and effects there situate may have been obtained, though it was not in respect of that foreign property that the probate was granted; but assuming the fact of a probate being used for one purpose abroad, if it was granted for another at home, it does not by any means follow that the person possessing the probate, having used it for the purpose of getting in a foreign estate, and being enabled by that means to get in that foreign estate, that he must be said to have obtained the

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probate for the sake of getting in that foreign estate. This is not decisive at all of the question; I only throw it out for the purpose of disembarassing the case of that argument. It will not be on such ground that I should propose to your Lordships to decide against the judgment of the Court below; I shall feel it to be my duty to consider the case with great anxiety before I shall be prepared to come to a conclusion.

I was very much impressed with the argument as to the nature of the probate granted by the Ecclesiastical Court, and the ground for granting it, as connected with the jurisdiction of the Ecclesiastical Court. If I could be satisfied that the Ecclesiastical Court has so far forth taken into its view goods or personal estate of a testator or intestate locally situate beyond its jurisdiction; that, after the period of its having granted probate, for instance; or that before probate was granted, when the estate was administered in *pious usus*, for the safety of the soul, as it was called, which meant, in many cases, the benefit of the survivor (or, at least, persons might be disposed so to consider it), that at any time the bishops, by which I mean the Romish bishops (for they alone are responsible), had drawn over to the same uses property out of their own diocese; that, having possessed themselves of that which was within their grasp at the time of the death of the party, they had afterwards extended that grasp abroad, so as to get hold of that which at the time of the death was not within their diocese, and had taken that for themselves; that would go a very great way in support of the Attorney-General's argument, and would be almost conclusive, as it would almost

entirely displace the very ingenious arguments of Mr. Rolfe and Mr. Wigram.

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This is a matter not merely of antiquarian curiosity, it bears most materially upon the case; it is a subject which I shall take care to inquire into, and, happily, I have the best means of prosecuting that inquiry by ascertaining the opinion upon it of men of very great learning and experience, the learned Judges in the Ecclesiastical Courts: I shall communicate with them upon that subject, and ascertain their opinion of the extent of Ecclesiastical jurisdiction in former times. But then, if I shall find that the Ecclesiastical Court had not jurisdiction over property beyond its own limits, there will arise another difficulty, which is flung out by the Attorney-General, who argues, if the ordinary did not get it, what became of it; it was not *bona nullius*, nor was it *bona vacantia*. To whom did it go if it did not go to the ordinary *pro salute animæ*? I suppose it will not be said that it belonged to the lord of the manor: it would be ridiculous to make that supposition. It will not be said that it belonged to the Crown. I never heard of its being considered as mere *bona nullius*, or *bona vacantia*. There must be some administration, some mode of dealing with it; and if that is not of a local nature, if it is not limited by the extent of the diocesan's jurisdiction, who assumed to administer in those days, and subsequently has granted probate to the executor, confirming the appointment of the deceased, or letters of administration appointing the individual to discharge the duty in relation to that property, the difficulty is to see by what rule it is to be determined.

These are the points which I wish to look into,

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and I shall do so most carefully, because, though the case depends much upon them, they do not appear to have exercised the ingenuity and called for the learning of the counsel below, or to have received any adjudication, or, I may say, any consideration, from the learned Judges of the Court below. So far as I can perceive, they appear not to have been argued—certainly they appear not to have been decided—by any of the learned Judges, or to have formed any ingredient in their decision. The decision was given by the Lord Chief Baron alone: it was given by him after time taken for consideration: whether it was pronounced verbally, or whether it was in writing, is quite immaterial; a judgment delivered by the head of the Court, after time taken for deliberation, must, as it is said, be taken to be the judgment of the whole Court; and that is true. Nevertheless, Mr. Baron Bayley, it appears, did take a part; he threw out, in the course of the argument, various interlocutory remarks, some of which are valuable. I have looked at them with reference to the Lord Chief Baron's judgment. They bear the marks of Mr. Baron Bayley's well-informed and acute understanding; and I think I can trace the reasonings of his observations in the judgment. I think, from my long experience of that very learned and acute Judge, acute in all matters, and particularly in this kind of argument, if I may say so, it appears to me to be very much his judgment. He throws out several observations of importance, which add weight to the judgment finally given; and I see that the bias of that learned Judge's mind, the direction which it had received in reasoning on the question, influenced the disposal of the case.

I shall take every means in my power of informing myself before I move your Lordships to proceed to judgment, whether probate is to be considered as limited or unlimited, restricted to the personal estate of the testator in the diocese at the time of his death, or otherwise. The case may very probably, if not altogether depend, or at all events may turn materially upon the inquiry which I have stated that I shall deem it proper to make: I mean as to what was formerly the case in respect of jurisdiction, and the mode in which the Ecclesiastical Court dealt with such subjects in a foreign country at the time of the individual's decease. Upon these grounds, therefore, I shall move your Lordships that the further consideration of this question be postponed.

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Lord Chancellor.—This was an appeal from a decision of the Exchequer, the unanimous judgment of that Court upon an information filed by His Majesty's Attorney-General, for the purpose of obtaining payment of probate duty in respect of assets of the testator, which at the time of his decease were situate without the jurisdiction of the Court. Aug. 12.
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When the case was argued I entered at some length into the subject, and the reasons on both sides, and stated that I could not agree with the argument urged by the Attorney-General in his reply; that I did not think that the use which had been made of the probate was a test of itself sufficient to demonstrate the purpose for which the probate had been granted. The words of the act refer, not to the use eventually made of the probate, but they refer distinctly to the purpose for which

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the probate was granted, by which it appears what was in the mind of the Court at the time of granting the probate, which is the judgment of the Court granting the probate. The words of the schedule are to be the rule upon the present occasion, and they do not appear to me to show, though the probate has been eventually *de facto* made available to collect foreign funds, that such use is to be any test whatever in trying whether or not this case of foreign funds comes within the schedule by reference to the purpose for which it was granted, or to which it was applied.

It appeared to me that much must depend upon the course of practice of the Ecclesiastical Court in matters of probate, and whether it assumes a jurisdiction coextensive with the estate of the deceased party whose will is brought for proof. If they assume to deal with the property, or in any way to hold it as within their reach and grasp, then it might be said that the probate attached on the property wheresoever situated; that it bore relation to the property; that it was issued in respect of that property; and the duty would attach. But if, on the other hand, it should be found, that in fact the probate was merely granted in respect of the personalty at the time of the death within the jurisdiction of the ordinary, then *cadet quæstio*; for, by *parity* of reasoning (on the contrary side), this is not a case that comes within the words of the schedule, and, consequently, no probate duty attaches.

Now, it is maintained (and I dwelt upon this argument when the case was last before your Lordships), and I think justly maintained, that the probate is granted by the ordinary, and taken upon

him in respect of the ancient practice existing in former Popish times, which arose from the interest that the ordinary had in the personalty of individuals to be applied to pious uses for the safety of the souls of these individuals. That is probably the origin of the probate duty, which gave a great interest in the personalty to the clergy. The pious uses they applied them to it is needless to inquire into: a great many masses were said, no doubt. One pious use was the ecclesiastical persons themselves using the money and taking possession of the property. That was deemed emphatically a pious use, no doubt; with that we have nothing to do now. But from that custom arose a practice with which we have a great deal to do, and upon that hinges the present case. From that arose the necessity of probate, the ordinary relinquishing the right to the property, and vesting it in the administrator or the executor, by granting probate with the will annexed, or granting administration if there was no will, and conferring that authority upon another. From thence arose, in later times, the claim of the ordinary to vest the power in other parties.

Now, if the ordinary could not lay claim, and never did lay claim to any thing beyond the goods of the party in his jurisdiction at the time of his death, if he never thought of calling for foreign funds, and making his claim to them for pious uses, because the man died in his jurisdiction, by the force of the argument I have now used it clearly appears that the probate could not be granted except in respect of goods within his jurisdiction; and if so, the probate duty cannot attach in this case. There is a clear omission. I believe

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the statute meant that it should attach; but if the legislature has used insufficient language for the purpose, the payment cannot be enforced. I have made inquiry of two very learned authorities, of one of whom I should say more if I did not speak in his presence; I have also referred to the King's Advocate, and they entirely corroborate explicitly my view of the confined and restricted jurisdiction, and the nature of the ordinary's office, and the goods in respect of which probate is to be granted.

That of itself would be a strong ground for my affirming the decision of the Court below; but I will not conceal from your Lordships that I have another reason that operates very strongly on my mind: unless it was quite clear there had been a miscarriage below (and I used the same argument in *The Attorney-General v. Jackson*, with the perfect concurrence of the Lord Chancellor of Ireland), I should hold that it would not be advisable to shake the decision of the Court of Exchequer upon a revenue question—to shake a decision unanimously pronounced after great deliberation, and full argument and time taken to consider by one of the Judges on behalf of his brethren. To shake their decision upon a revenue question, which is a kind of matter that more especially belongs to that jurisdiction, I think is eminently unadvisable; and I have no such clear opinion, independently of the last topic I have adverted to of the authorities I have referred to for information and assistance. I have not felt sufficient confidence in the opinion that the Court of Exchequer has miscarried; and without saying that the case is free from difficulties, and without saying that there are not things that

are not explained, and one or two *dicta* which conflict with each other upon the subject, not decisions, but I think there are one or two *dicta* in *Ewin's case*, which I argued in the Court of Exchequer. I recollect those *dicta* from a particular circumstance: they were *obiter dicta* as regarded the question of probate. It was not a question of probate; but, in the pressure of the argument, feeling that I was under considerable difficulty in arguing the question of legacy duty, I thought the Court more likely to be with me on the question of probate duty, and, as counsel often do, I argued probate; and it was in that way I drew the Court aside from the question at issue, and obtained that *obiter dictum*. It was the last case I argued before I took the Great Seal. I may say I have a very full recollection of it. These *dicta* are not sufficient to induce me to shake the decision of the Court below: they furnish no ground for a reversal; and, upon the whole, I recommend to your Lordships to affirm the decision, but without costs.

Judgment affirmed.

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ENGLAND.

(COURT OF CHANCERY.)

WILLIAM HARLAND, WILLIAM C.	} <i>Appellants;</i>
HARLAND, and ORFEUR WILLIAM	
KILVINGTON	
JAMES LLOYD EMERSON, JANE L.	} <i>Respondents.</i>
WALCOT, and EDMUND GEORGE	
DENHAM	

H. being seised in fee of lands, &c., devised them to his four sons, P., J., R., & C., in succession, for their lives respectively, and to the heirs male of their bodies respectively in succession and for want of such issue, to all and every the daughters of such sons and their heirs, as tenants in common. After the death of H., the eldest son, P., entered upon the lands, &c. devised, and died without male issue, leaving E. & A., two daughters; and J., the second son of R., upon the death of P., entered upon the lands, &c. devised, and died without male issue, leaving Anne, a daughter. R. & C., the third and fourth sons, died bachelors. E. died a spinster, having devised to O. her interest in the lands, &c. A., the other daughter of P., married G.

Upon the death of C., the last surviving son of H., Anne, the daughter of J., claimed to be entitled to a third of the lands devised by H., &c.; and thereupon an indenture was executed between Anne of the one part, and G. & A. his wife, of the other part, reciting that Anne was clearly entitled to part of the lands, &c. devised; but that a doubt or question had arisen as to other parts of the lands, &c., upon the joint operation of the respective devise by H. & P.; and that to avoid litigation respecting such last-mentioned lands, &c., the interest, if any, of Anne therein should be, and they were accordingly, to the extent of such interest, thereby leased to G. & A. his wife for a term of ninety-nine years, if they or either of them should so long live, at a rent thereby reserved. After the execution of this indenture, Anne married T., and her estate and interest in the lands, &c. was

settled, in default of issue of the marriage, upon the survivor of them in fee.

G. having died, A. married a second husband, and under the settlements upon that marriage, and the will of A., her estate and interest in the lands, &c. vested in the Appellants W. & W. C., who were in possession; and the estate and interest of E., the other daughter of P., vested in O., the other Appellant, who was also in possession.

Anne, having survived T., died without issue and intestate; whereupon the Respondents, claiming as heirs *ex parte maternâ* of Anne, filed a bill in Chancery, stating their title and the facts as above set forth. They charged that there were no heirs of Anne *ex parte paternâ*, and set forth their pedigree. The bill also charged that the Defendants (Appellants), being in possession, had received one third of the rents on behalf of the heirs of Anne; that the pretence that there was an heir of Anne *ex parte paternâ* was set up to enable them to keep possession, as it would appear if they would set forth his name, residence, and the particulars of his pedigree. The bill further charged, that the Defendants had, by correspondence and otherwise, admitted the title of the Plaintiffs to one third of the lands, &c.; that in such correspondence the facts and circumstances set forth in the bill, or some of them, had been admitted or noticed; and that documents, &c. were in their possession, &c., from which the truth of the allegations of the bill would appear. The bill then required the usual discovery, and prayed a declaration of the right and account of rents received, &c.

The Defendants jointly and severally pleaded, to the whole of this bill, that Louisa, the wife of, &c. was, at the death of Anne, in the bill named, and then was, heir at law of the said Anne, *ex parte paternâ*, of the whole blood.

This plea having been overruled upon argument, and the order to that effect affirmed on appeal to the Lord Chancellor, the judgments of the courts below were affirmed on appeal to parliament, on the ground that the Defendants were bound to answer some of the charges in the bill, and that the plea, without such answer, was insufficient.

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THE suit in which this appeal arose was instituted in the Court of Chancery in England by the

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Respondents, who filed their bill in Michaelmas Term, 1829, against the Appellants.

The bill stated that Richard Harland, being seised or entitled in fee simple of or to divers manors, messuages, lands, and hereditaments situate at Sutton, New Park, Huby, Cornborough, and elsewhere in the county of York, and also of divers messuages, lands, and hereditaments in the city of York, and being also possessed of or entitled to a leasehold estate at Marton, Marton Lordship, and Deepley, in the said county, held under the dean and chapter of York for certain lives renewable for ever on payment of a fine certain, by his will, bearing date the 31st day of July, 1747, duly executed and attested for passing freehold estates, devised all his manors, lands, tithes, tenements, and hereditaments of which he was seised in possession or reversion, situate in Sutton, New Park, Huby, Cornborough, and the city of York, unto the testator's first son, Philip, for life, with remainder to his first and every other son successively in tail male, subject to a charge in the said will mentioned; and for want of such issue, to the testator's son John for his life, with remainder to his first and other sons in tail male; and for want of such issue, as to all the premises except the manors and estate at Cornborough and New Park, he gave the same to his (the testator's) son Richard for life, with remainder to his first and other sons in tail male; and for want of such issue as aforesaid of the testator's son John at his decease, and of the testator's son Richard at his decease, he devised the estate excepted from his son Richard immediately after the death of his said son John, and the estate limited

as before to his son Richard, upon failure of such issue as before mentioned, to his son Charles for his life, remainder to his first and other sons in tail male; and for want of such issue, he devised his manors and estate at Cornborough and New Park to his son Richard for his life, remainder to his first and other sons in tail male; and for want of such issue, remainder to all and every the daughter and daughters of all his said four sons, and their heirs, as tenants in common; and after certain provisions and bequests, the testator devised and bequeathed the residue of his real and personal estate to his son Philip, and appointed him executor of his will.

The bill further stated the death of the testator, leaving his wife and his four sons surviving, and that Philip Harland, his eldest son and heir at law, proved his will and entered on the estates devised to him; and that under an enclosure act some of the estates devised by the will were given in exchange for other lands which were conveyed and settled to the same uses as the devised estates; and that Philip Harland purchased divers other freehold estates situate in the county of York, and in the city of York, and elsewhere, to part of which he was entitled in fee simple, and to part under leases determinable with lives, but renewable.

The bill then stated, that by his will, bearing date the 18th of December, 1764, and duly executed and attested for passing freehold estates, Philip Harland, in regard that his brothers were only of the half blood, devised, in case he left no issue male of his own body, all his freehold estates, lands, tenements, and hereditaments in possession, rever-

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sion, or remainder, situate in the township of Sutton on the Forest, together with the rectory of Sutton and the leaseholds for lives granted to him by the Archbishop of York and Edward Thompson, Esquire, respectively to trustees therein named (all of whom were long since dead), and their heirs, in trust for such person or persons, and for such estates and interest as were limited and declared by the will of his father, the said Richard Harland, concerning the manors, lands, tenements, and hereditaments in Sutton, New Park, Huby, Cornborough, and the city of York, or as near thereto as might be; and the said testator devised all other his leasehold lands and premises in the parish or township of Sutton to his brother John for ever, hoping he would continue them in the family; and he also devised divers other lands and tenements therein mentioned to the said trustees therein named in fee in trust for his three brothers successively for life and their issue in tail male, as therein mentioned (which several estates had failed and determined); with remainder in trust for all and every the child and children of the said testator's daughters, or the child and children of one of them if the other died without issue, and their heirs, to be divided, share and share alike; and if there was no such issue, in trust for such person or persons and for such estate and interest as expressed and limited by the will of his father, the said Richard Harland, or as near thereto as might be; and the said testator devised certain other estates therein mentioned to his daughters as tenants in common in fee, and appointed John Harland executor of his will,

The bill further stated that Philip Harland died

in or about the year 1766 without issue male, leaving his daughters Elizabeth and Anne his coheir-esses at law, and also leaving his three brothers him surviving; and that shortly after his death his will was proved by John Harland, who also entered into possession of all the estates devised by the wills of Richard Harland and Philip Harland respectively, and continued in possession till his death.

The bill then stated the death of John Harland in the year 1772 without issue male, leaving Ann Harland, afterwards Ann Trigg, his only child and heiress at law; and the successive deaths of Richard Harland and Charles Harland in the year 1784, both without issue.

The bill further stated the marriage of Ann, one of the daughters of Philip Harland, with the Reverend Henry Goodricke, and the death of Elizabeth, the other daughter of Philip Harland, in the year 1782, without having ever been married, and leaving her sister, Ann Goodricke, her heiress at law; and having by her will devised all her freehold, copyhold, and leasehold estates, lands, tenements, and hereditaments, to her sister, Ann Goodricke, for her life, in manner in the said will mentioned, remainder to her godson, Orfeur William Kilvington, his heirs, executors, administrators, and assigns.

The bill then stated that on the decease of the said Charles Harland (the survivor of the said four brothers), Ann Harland, the daughter of John Harland, claimed to be entitled to an undivided third part of the freehold and leasehold estates devised by the said wills of Richard Harland and

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person or persons in trust for her, was or were seised of, or entitled to any estate of inheritance, to the use of the said Richard Trigg and his assigns for his life; remainder to trustees to preserve contingent remainders; remainder to Ann Harland for life; remainder to trustees to preserve contingent remainders; remainder to the use of all and every the child and children of the said Ann Harland by the said Richard Trigg, in manner therein mentioned; and in case there should be no such child or children (an event which happened), to the use of the said Richard Trigg and Ann Harland, and the survivor of them, and the heirs and assigns of such survivor for ever.

The bill then stated that in or about 1791, Henry Goodricke died, leaving Ann Goodricke him surviving; and some time afterwards the said Ann Goodricke intermarried with Charles Hoar, Esquire, who afterwards took the name of Harland, and being subsequently knighted, became Sir Charles Harland; and that on the marriage of the said Charles Hoar and Ann Goodricke, a settlement was executed, whereby the share of Ann Goodricke in the messuages and lands at Sutton, devised by the wills of Richard Harland and Philip Harland, was conveyed and settled to the use of Charles Hoar for life, with remainder to Ann Goodricke in fee, and whereby the share of Ann Goodricke in the remainder of the said estates was settled and assured to or to the use of the said Charles Hoar, afterwards Sir Charles Harland, in fee, or as he should appoint. The bill also stated the death of the said Sir Charles Harland, and his will, dated December 15th, 1802, duly executed and attested, whereby he devised all his real estates to

his brother, William Hoar, now William Harland (one of the Appellants), for his life, remainder to the first and other sons of the said William Hoar in tail male, remainder to the said William Hoar in fee; and that the said William Hoar, now William Harland, had at the death of the said testator, and had then, one son (the Appellant), William Charles Hoar, a Defendant in the said bill named, who had attained the age of twenty-one years, and had taken the name of William Charles Harland; and that William Harland, as the tenant for life of the estates devised by the will of Sir Charles Harland, entered into and had ever since had the possession of the estates so devised, or the receipt of the rents and profits.

The bill then stated the will of Dame Ann Harland, the widow of the said Sir Charles Harland, bearing date the 29th day of April, 1822, and the codicil thereto, dated the 3rd of March, 1825, both duly executed and attested, whereby she gave all her real estates, subject to certain trusts therein mentioned, to the said William Charles Hoar for his life, remainder to his first and other sons in tail male, and appointed the said William Charles Hoar executor of her said will; and that the said Dame Ann Harland died on or about the 29th of June, 1826; and that shortly after her decease the said William Charles Harland entered into the possession of some part of the said estates and hereditaments late belonging to the said Richard Harland and Philip Harland, or taken in exchange as aforesaid, claiming to be devisee thereof for life under the will of the said Dame Ann Harland, and had ever since been in possession of the same; and that upon the decease of the said Dame Ann Har-

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land, the Appellant, Orfeur William Kilvington, entered into and had ever since continued in possession of the remainder of the said estates and hereditaments, claiming to be the devisee thereof, in fee, under the will of the said Elizabeth Harland, daughter of the said Philip Harland, in remainder after the estate for life of the said Dame Ann Harland.

The bill further stated, that the said Ann Trigg, daughter of the said John Harland, the second son of the said testator Richard Harland, died in or about the month of August, 1826, intestate, and without issue, having survived her husband, the said Richard Trigg, and by her death the said agreement and lease between her and the said Henry Goodricke and Ann his wife determined; and that at the time of the death of the said Ann Trigg, the male line of the family of the said Ann Trigg was extinct, and that she had not any heir or heirs on the side or part of her father; and that at the time of her death the said Respondents, Jane Louisa Walcot, and the Rev. John Edmund Denham, and Mary Emerson, were her cousins and heirs at law on the maternal or mother's side. The bill then set forth the pedigree of the last-named Respondents, from Ann Norman, the wife of the said John Harland, the second son of the said testator Richard Harland, and alleged that the said Respondents were the heirs at law on the maternal side of the said Ann Trigg, and that they were advised that they were entitled to one equal third part or share of the several estates respectively devised by the wills of the said Richard Harland and Philip Harland respectively, and of the estates taken in exchange as aforesaid, in the proportions in the said

bill mentioned, and to a proportionate part of the said yearly rent, under the said agreement and lease of the 10th of April, 1785, from the last half-yearly payment thereof to the day of the decease of the said Ann Trigg, and to one equal third part of the rents and profits of the said estates and hereditaments accrued due since her decease, which rents and profits the bill alleged to have been received by the defendants thereto, or some of them.

The bill charged, that by the said agreement and lease of the 10th day of April, 1785, it was agreed and admitted that the said Ann Trigg, then Ann Harland, was clearly entitled to one undivided third part of and in the said estates at Cornborough and New Park, and that her right was subsisting and in full force at her decease, notwithstanding a decree pronounced in the High Court of Chancery in a suit in the said bill mentioned, to which the said Ann Trigg was not a party; and that the Appellants had, since the decease of the said Ann Trigg, received one third part of the rents and profits of the said estate at Cornborough and New Park, in the name, and on the account, and for the use of the heirs of the said Ann Trigg, and they or one of them had signed and given receipts for one third or some other proportion of such rents in the name or for or on behalf of the said Ann Trigg; and that the rents so received had been to a very considerable amount, and had been paid into the hands of some banker or bankers, or invested in some securities in the name or for the use or benefit or on the account of the heirs of the said Ann Trigg; and that the Appellants sometimes admitted that the said Ann Trigg was, in her lifetime, and that her heirs were, entitled to one third of the said estates in Cornborough and New Park, and that

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the heirs of the said Ann Trigg were entitled to one third of the rents of the said last-mentioned estates accrued since the death of the said Ann Trigg, but that the Appellants alleged that there were some charges or incumbrances affecting the said estates under the wills of the said Richard Harland and Philip Harland prior to the claims of the Respondents, though they refused to discover the particulars thereof, and who were entitled to the benefit thereof, at other times pretending that the said Ann Trigg was not in her lifetime, and that her heirs were not now, entitled to any share or interest in any other of the estates devised by the said wills of Richard Harland and Philip Harland respectively, or either of them; and further pretending that the said Respondents were not the heirs or heir of the said Ann Trigg, but that some other person or persons are or is such heir, but who in particular they refuse to set forth or discover.

The bill further charged, that the whole of the several sums of money charged on the estates devised by the wills of Richard Harland and Philip Harland had been long since paid off and satisfied, and that all the limitations prior to the devise in favour of the daughters of the sons of the said Richard Harland had become satisfied, and all the trusts created by the said wills had been fully performed; and that according to the true construction of the said wills of the said Richard Harland and Philip Harland, the said Ann Trigg, as the only daughter of the said John Harland, the second son of the said testator, Richard Harland, and brother by the half blood of the said testator, Philip Harland, became in the events in the said bill set forth seised of or entitled to an equal third part or share of all the estates and premises devised by the will

of the said Richard Harland, as well those in Cornborough and New Park as in Sutton, Huby, and the city of York, or elsewhere, and the estates taken in exchange as in the said bill mentioned, except the leasehold estates for lives bequeathed by the will of the said Philip Harland as the residuary legatee of the said Richard Harland; and that the said Ann Trigg, in like manner, was seised of or entitled to an equal third part of all the estates of the said Philip Harland, and the estates taken in exchange, as in the bill mentioned, including the said leaseholds renewable for lives to which he became entitled, as therein mentioned; and that the said Elizabeth Harland and Ann Goodricke, afterwards Dame Ann Harland, were entitled to the other two third parts of the said estates; and that under the will of the said Elizabeth Harland, the said Dame Ann Harland became entitled to the share of the said Elizabeth Harland in the said estates for life, with remainder to the Appellant Orfeur William Kilvington in fee.

The bill, alleging that the Appellants sometimes pretended that there was in existence an heir *ex parte paternâ* of the said Ann Trigg, charged that they set up such pretence merely to enable them wrongfully to continue in the possession of the said one third part of the estates and hereditaments late belonging to the said Ann Trigg, for that they had no reasonable ground whatever for making such pretence, as would appear if they would set forth the actual grounds on which they made such pretences, and who, as they pretended, was such heir *ex parte paternâ*, and where he resided, and how he made out his pedigree. The bill further charged, that the Re-

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spondents were the coheirs at law of the said Ann Trigg, and as such entitled in the shares in the said bill mentioned to the estate of or to which the said Ann Trigg was seised or entitled at the time of her decease, and to a proportionate part of the yearly rent up to the decease of the said Ann Trigg, and to one third of the rents and profits of all the said estates accrued due since her decease; and that the Appellants had respectively sold and disposed of some parts of the said estates, and had received the purchase monies for the same; and that an indemnity had been given to the purchasers of the said estates, or some of them, in respect to the claims of the said Ann Trigg or her heirs; and that the Appellants, or some or one of them, had applied such purchase money to their own use, and had also exchanged other parts of the said estates for other lands and hereditaments, and had intermixed the said estates, and confused the boundaries thereof; and that the Respondents were unacquainted with the particulars thereof.

The bill further charged, that the Respondents were desirous of proceeding at law to recover possession of the one third part of the estates and premises descended on them, but that the Appellants intended to set up, unless restrained by injunction, some legal outstanding estate vested in some person or persons as trustee or trustees in fee simple, or for some terms or term for years; and that the said Respondents could not proceed at law to recover such of the said hereditaments and premises as had been conveyed to or in trust for the Appellants by way of exchange, inasmuch as the Respondents had not the legal estate, and could not procure the same

without the aid of the Court; and that the Appellants at times pretended that there were various other persons who have some interest in the premises, but refused to discover who they were, where they resided, or what interest they claimed, or how, when, and from whom they acquired the same; and that the agent of the Respondents had applied to Mr. Brook, the solicitor of the Appellants, or of some of them, and requested to be informed who were the persons who claimed to be entitled to or interested in the said hereditaments and premises, but the said Mr. Brook refused or declined to give any answer to such application.

The bill also charged that the Appellants had frequently, by correspondence and otherwise, admitted the title of the Respondents to the said one third part of the said hereditaments and premises, or some part thereof, and that they had corresponded together and with various persons relative to the circumstances aforesaid, and in such correspondence the facts and circumstances in the said bill set forth, or some of them, had been admitted or noticed; and that the Appellants had now, or lately had, in their possession or power the title deeds and evidences of title of the several estates in the bill mentioned, or some of them, or some part thereof, and also divers other deeds, writings, evidences of title, accounts, books of account, letters, notes, copies of or extracts from letters, notes, vouchers, documents, papers, and writings of or relating to the said several estates and premises, or some of them, or to the share and interest of the said Ann Trigg therein, and relating to the rents and profits of the said hereditaments and premises, which had accrued since the death of the said Ann Trigg, or relating to the several mat-

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ters in the said bill contained, from which, if produced, the truth thereof would appear.

The bill prayed that it might be declared that the Respondents, James Lloyd Emerson, Jane Louisa Walcot, and Edmund George Denham, as the coheirs of the said Ann Trigg, the only daughter of the said John Harland, were entitled in the respective shares in the said bill mentioned to the proportionate part of the yearly rent of 300*l.* up to the day of the decease of the said Ann Trigg, and to one equal third part or share of and in the freehold and renewable leasehold estates devised by the said recited wills of the said Richard Harland and Philip Harland respectively, and in the estates taken in exchange for the same respectively, and of the rents and profits thereof respectively accrued due since the decease of the said Ann Trigg; and that an account or accounts might be taken, by and under the direction and decree of the said court, of the freehold and renewable leasehold estates, devised by the said wills of the said Richard Harland and Philip Harland respectively, and of the estates taken in exchange for the same respectively, and of the situations, boundaries, and value and extent thereof respectively; and that it might be referred to one of the masters of the said court, to inquire and ascertain whether any and what part or parts of the said estates, or any of them, had at any time or times since the respective deaths of the said Richard Harland and Philip Harland been sold or exchanged, and when and by whom and to whom, and for what prices or sums of money, or for other lands and hereditaments, and whether the same had been properly sold and exchanged, and by whom the purchase monies for such parts

thereof as had been sold had been received, and how the same had been applied or disposed of; and that one third of such purchase money might be decreed to be paid and secured to and for the benefit of the said Respondents in the proportions following; (that is to say,) that one equal fourth part thereof might be secured for the benefit of the said Respondent James Lloyd Emerson during his minority, that one other fourth part thereof might be paid to the said Respondent Jane Louisa Walcot, and that the remaining two fourth parts thereof might be secured for the benefit of the said Respondent Edmund George Denham during his minority; and that an account might be taken of the rents, issues, and profits, of the several estates and hereditaments respectively possessed or received by the Appellants William Harland, William Charles Harland, and Orfeur William Kilvington, or any or either of them, or by any person or persons by their or any of their order, since the decease of the said Ann Trigg, and of the application thereof; and that the Appellants might be decreed to pay one equal third part of the amount of such rents, issues, and profits to the said Respondents in the shares and proportions aforesaid; and that the shares of the said Respondents, James Lloyd Emerson, and Edmund George Denham respectively, in the said one third of the rents and profits, might be secured and applied for their benefit, during their respective minorities, under the direction of the said Court; and that a partition and division of the said estates and premises between and among the Appellants and the said Respondents, according to their respective estates and interests, might be made by and under the decree

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of the said Court; and that one or more commission or commissions might be issued out of the said court, directed to proper persons to make such partition; and that the said estates might be conveyed in severalty to the persons entitled thereto upon such partition; and that all proper parties might be decreed to join in making such partition and division, and in executing all necessary conveyances for effectuating the same; and that the several title deeds, writings, and evidences of title of and relating to the said estates, might be brought into the said court for safe custody; and that some proper person might be appointed to collect and receive the rents, issues, and profits of the said estates; and that the Appellants might be restrained by injunction from setting up any outstanding term or terms affecting the said hereditaments and premises, in any action or actions at law which the Respondents might be advised to bring for establishing their title to the aforesaid one third part of the said hereditaments and premises; and that all proper and necessary directions might be given for the several purposes aforesaid, and for further relief.

The Appellants appeared to the bill, and put in the following plea:—

“ These Defendants by protestation not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true, in such manner and form as the same are therein set forth, do plead to the whole of the said bill, and for plea say that Lois, the wife of Timothy Morine, of Wetherby, in the county of York, gentleman, formerly Lois Harland, was at the death of Ann Trigg, in the said bill named, and now is, heir at law of the said Ann Trigg, *ex*

“ *parte paterná* of the whole blood, all which these
 “ Defendants aver to be true, and are ready to
 “ prove the same as this honourable Court shall
 “ direct; and these Defendants do plead the same
 “ to the whole of the said bill of complaint, and
 “ humbly demand the judgment of this honourable
 “ Court whether they ought to be compelled to
 “ make any further or other answer thereto.”

The matter of the plea came on to be argued before his Honour the Vice Chancellor, on the 4th of May, 1830, when his Honour held the plea to be insufficient, and ordered the same to be overruled, with costs. The Appellants, conceiving themselves aggrieved, appealed from the said order to the Lord Chancellor, who, on the Appellants consenting to pay such costs as the Court might award, appointed the same matter to be reheard in the ordinary course.

The matter of the plea was heard by Lord Lyndhurst, then Lord Chancellor, on the 9th day of August, 1830: no judgment was given thereon before his lordship resigned the great seal; but the parties in the suit having consented to receive his judgment in the matter, Lord Lyndhurst, on the 2d of March, 1831, delivered the following judgment in writing:—

“ In the case of *Emerson v. Harland*, I am of
 “ opinion that the plea was properly overruled,
 “ and that there are parts of the charge in the bill
 “ which require the plea to be accompanied with
 “ an answer and discovery, according to the prin-
 “ ciple laid down in *Saunders v. King*, 6 *Maddock*;
 “ and *Gun v. Prior*, 1 *Cox*.”

An order overruling the plea was accordingly

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drawn up, bearing date the 22d day of November, 1830.

The appeal was against this order.

For the Appellants, Mr. *Swanston* and Mr. *Wigram*.

This is an affirmative plea, the truth of which the pleader undertakes to verify. Until the truth or falsehood of the plea appears, no further answer can be required. If true, it is a bar to the claim, and the bill must be dismissed. The Appellants by this plea seek to protect themselves against the expense in which they would be involved by answer. This is the principle of the rule laid down by Lord Redesdale in his Treatise.* The mischief of compelling discovery where the case may be reduced to one point is illustrated in the same book.† Lord Thurlow at first overruled a negative plea‡, but afterwards doubted§ of the correctness of that decision, from the consequence of permitting a party, by alleging a false title, to compel a discovery of private transactions. Since the time of Lord Thurlow, negative pleas have been always allowed.|| This is an affirmative plea, but it is argued that it must be supported by an answer. Now this plea puts in issue whether the Plaintiff is heir, and any answer as to the evidence of that fact would overrule the plea according to the practice and rule as stated by Lord Redesdale.¶ This plea was overruled on the authority

* P. 283. 4th ed. † P. 230.

‡ *Newman v. Wallis*, 2 B. C. C. 142.

§ *Hall v. Noyes*, 3 B. C. C. 483.

|| *Drew v. Drew*, 2 V. & B. 159. *Saunders v. King*, 6 Mad. 61. *Thring v. Edgar*, 2 Sim. & Stu. 274.

¶ P. 299.

of cases*, the correctness of which we do not dispute, but they are inapplicable to this bill and plea. In the bill in this case there is no special charge of facts as evidence of the Plaintiff's title. General allegations will not entitle a Plaintiff to a discovery.† As to the documents of title, the question is upon motion for the production. The rule as to the form of plea appears by the decision in *Thring v. Edgar*, where it was held that an answer to the allegation covered by the plea overrules it. That the facts of which discovery is sought must be specially charged as evidence of the Plaintiff's title, appears in *Pennington v. Beechey*‡, and later cases§ confirm the rule more forcibly. Where fraud is charged, or an allegation made, which, if true, would destroy the plea, that charge or allegation must be answered. But this is not such a case.

The Plaintiff may be entitled to a discovery of all facts which make out his own case, not of those which make out the Defendant's case. He has no right to inquire into the grounds of, or to fish out the evidence for the defence which this bill seeks. The question raised by the plea is, whether a third person has a title, which would displace the alleged title of the Plaintiff. If the Defendants do not make out the affirmative fact alleged in their plea, the title of the Plaintiffs, as heirs *ex parte maternâ*, is admitted by the form of the plea. The possession of documents which show that title as charged

* *Gun v. Prior*, 1 Cox, 197. *Saunders v. King*, 6 Mad. 61.

† *Jones v. Jones*, 3 Meriv. 161. *Freitas v. Dos Santos*, 1 Y. & J. 574.

‡ 2 Sim. & Stu. 232.

§ *Tarleton v. Hornby*, 2 Younge, 172. *Hardman v. Ellames*, 2 M. & K. 732.

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by the bill is also admitted by the plea, and no discovery is wanted.

For the Respondents, Mr. *Knight* and Mr. *Spence*.

This is a mere question of title, not of forfeiture or crimination. The party under whom the Plaintiffs claim, was seised as a purchaser. They claim as heirs on the part of the mother; and in deducing the title from that person, it is indispensable to show that there is no heir on the part of the father. The plea to meet that case is, that there exists an heir on the part of the father; and yet it is argued that it is not a negative plea. As to the charge that the Defendants, in correspondence with each other, and third persons, have admitted the title of the Plaintiffs, it is contended that the usual words, "that as evidence of the title, &c.," are not added to the charge. But if it appears by necessary construction that they are evidence, it cannot be requisite to add the mere form of the words; and it is settled by many authorities*, that if facts are charged by the Plaintiff in his bill, which are evidence of his title, the Defendant cannot by plea refuse a discovery as to those facts. Where a bill charged that an account was kept, although it omitted the words "as evidence of the agreement," a plea not accompanied by an answer denying the fact of keeping the account was overruled. The principle is, that if the bill charges collateral facts which in their nature must be evidence of the title on which the Plaintiff stands, these charges must be answered. If there is in the bill any allegation which, if admitted, might be used to disprove the

* *Evans v. Harris*, 2 V. & B. *Jones v. Davies*, 16 Ves. 262—387. *Thring v. Edgar*, 2 Sim. & Stu. 274.

plea, the Defendant cannot by plea protect himself from that discovery.

Mr. *Wigram* in reply :

The admission of a party as to the title of another cannot be the subject of discovery. It cannot be used as an admission. In *Evans v. Harris*, and *Jones v. Davis*, special facts were charged as evidence of the Plaintiff's title, and not affecting an affirmative issue, as in this case, which the Defendant had taken upon himself to prove. If the common form of charge as to books and documents will entitle a Plaintiff to discovery, notwithstanding such a plea, all the mischief contemplated and explained by Lord Redesdale in his Treatise will be admitted.

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In the course and at the conclusion of the argument, the Lord Chancellor made the following observations :—

There was a case* in which the Defendants were allowed to put in a double plea; first, that the assets were personal; and secondly, if real, then that the party was a trader at the time of his death. This is contrary to the established rule of pleading, and I think has been overruled.

In this case the Defendants plead, in substance, that the Plaintiffs are not heirs, and propose to falsify the title which they set up as heirs *ex parte maternâ*, by proving that there is in existence an heir *ex parte paternâ*. But is the case made by the bill in the particulars charged, one which would be capable of proof or illustration by the disclosure of facts, of which a discovery is sought by the bill?

* *Gibson v. Whitehead*, 4 Mad. 241.

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It is urged on general principles that discovery ought not to be compelled, if on proof of the matter of the plea it will appear that the Plaintiff has no title. But if the title would in part be proved by discovery of the fact charged, does not that raise a distinct case, and form a ground of exception. Can a Defendant to such a bill suppress or evade the discovery by a simple denial of the title generally? That cannot be the office of a negative plea, or of any plea.

I purpose to take a little time to consider the authorities cited, particularly *Hardman v. Ellames**, a case which I decided after much consideration. At present I am disposed to advise the House to affirm the judgment.

The Lord Chancellor.—This was a question arising entirely upon the pleadings in the cause; and though I had little doubt at the time, as I then stated, and inclined strongly to the opinion of the Court below, for the reasons I shortly threw out, in the course of Mr. Knight's argument, who appeared as counsel for the Respondent, yet I took the liberty of delaying the further proceedings in the cause, until I should be enabled to look into *Hardman v. Ellames**, which lately gave rise to a good deal of discussion in the Court of Chancery, and in which I had the misfortune to differ from the Court below. I have since that looked into all these cases, *Hardman v. Ellames**, *Thring v. Edgar**, and *Saunders v. King**, decided by the same learned judge. I have also looked into *Jones and Davies**, *Newman and Wallis**, and other cases.

* *Quà suprà.*

Newman v. Wallis was a plea of no heir, which Lord Thurlow held bad, but he changed his opinion upon that subject. In a subsequent case, *Hall and Noyes*, he admitted he was wrong, and took a new view of the subject. *The East India Company and McGregor** is another case. I have gone through the whole of these cases, because, as I differed with the Court below in *Hardman and Ellames*, I thought possibly, on a reconsideration of the case, I might change that opinion. I have risen from the discussion and view of the cases greatly confirmed in the opinion I had in *Hardman and Ellames*; and although it has no very immediate reference to, nor is it decisive of, the present, I thought it might let in some light on the present case. I found a consistency in principle in all these cases; and where they differ the one from the other, the doctrine and practice must generally be considered as settled by the last decision. I find no reason whatever to doubt the judgment which has been pronounced by the Courts below. The case was twice decided, first by the Vice-Chancellor, and secondly by Lord Lyndhurst, who immediately afterwards quitted the Great Seal, and who was, by the consent of the parties, allowed to deliver his judgment in writing; it stands dated, for regularity's sake, on 22nd of November. I move your Lordships that this appeal be dismissed, and the judgment affirmed with costs; the costs not to exceed 150*l*.

Judgment affirmed.

* 2 Sim. 542.

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RICHARD BADHAM THORNHILL, ELIZABETH THORNHILL, Widow, G. KING THORNHILL, JAMES BADHAM THORNHILL, ANN RYE, otherwise THORNHILL, Widow, and SOPHIA GODSELL, otherwise THORNHILL, Widow	}	<i>Appellants;</i>
- - -		

FREDERICK HALL - - - *Respondent.*

T., by his will, after bequeathing to his wife and a married daughter and an infant son portions of a profit-rent of lands held by him on lease in Ireland, and stating that the account of his profit rents would be found in his new rent-book, and after reciting that it appeared by the rental that there was a profit-rent of 674*l.* (arising from a leasehold, called Thornhill Hall), which he apportioned between his eldest and his third son, the will contained the following clause: "And whereas there also appears on the lands of Killeen, over and above the head-rent of the same, a profit-rent of 251*l.*, I bequeath 200*l.* yearly of the above profit-rent to my second son, R. K. T., for his own sole use and benefit during the term of the said lease, being for mine, his own, and his brother George's life," &c. The testator then by his will proceeded to recite the amount of other profit-rents appearing in his rental-book, and to bequeath them to others of his sons. The will then contained the following clauses and provisions:—"And whereas there appears out of the lands of K., as now set, a profit-rent of 392*l.* 1*s.* 7½*d.* sterling, out of the same, over and above the head-rent of the same; now be it known, that I leave and bequeath 100*l.* yearly of the same to each of my three daughters, Ann, Caroline and Elizabeth Thornhill; the residue of the said profit-rent, being 92*l.* 1*s.* 7½*d.* sterling, I leave to my fifth son, Badham Thornhill, for his sole use and benefit, together with all future benefits and emoluments arising out of the same, except as before excepted. And whereas there appears a profit-rent of 79*l.* 15*s.* ster-

“ling arising out of part of Thornhill Lawn, set by lease to Robert Lewis, not included or mentioned in the demise and lands of Thornhill Lawn before mentioned; now be it known, I leave said rent, not subject to pay any part of the head-rent, that being already paid by the demesne and lands of said place, the above profit rent, as follows, viz.—
 ‘30*l.* yearly of the same to my daughter Ann Thornhill, 29*l.* 15*s.* to my daughter Caroline, and 20*l.* sterling to my daughter Eliza, in addition to the sums of 100*l.* each left them out of Knockanevin, together with all future advantages, if any should arise, out of the same, held by said Robert Lewis; and further, if any of the *above legatees should die, or die unmarried*, I leave the property bequeathed to them, with all benefit arising out of the same, to be divided equally, share and share alike, among the survivor or survivors of them. And also, in like manner, if any of the lives in the leases should die, *so as to leave any of the said legatees unprovided for*, by the lapse or fall of said life or lives in any of the above bequests, that, in such case, a proportion shall be deducted from the bequest of each, to make up the deficiency by the determination of such lease, as it shall so happen to fall, in proportion to the loss sustained, and in proportion of the property of the survivor or survivors.”

Then after specifying certain monies recovered by decree and owing to him upon bond and otherwise, and directing that they should be applied to pay his bond and judgment debts, he proceeded to leave “the residue or overplus of the same to be divided equally among all my legatees, wife, and children mentioned in this will, Mrs. Godsell included, except,” &c. “The residue of all my property real and personal to be sold and disposed of, 100*l.* of the same to be given to my wife for her present support—the residue to be divided among my three daughters, Ann, Caroline and Eliza,” &c. and then he incidentally directed that his eldest son should pay to J. F. “10*l.* yearly during his life out of Thornhill Lawn.”

Held, that the clause of survivorship applied only to the bequest to the daughters; and upon the whole context of the will, that the absolute bequest to R. K. T. of the profit-rent of 200*l.* was not cut down to a life estate, with an executory devise, over upon his dying unmarried, to the surviving legatees.

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JAMES BADHAM THORNHILL made his will, which was duly attested, for passing real estates, and bore date the 5th December 1794, as follows :—

“ In the name of God, Amen. I, James Badham Thornhill, of Thornhill Lawn, in the county of Limerick, being of perfect, sound and disposing mind and memory, praise to Almighty God for the same, do make and ordain this my last will and testament, in manner and form following (that is to say): First, I revoke and make null and void all former will or wills by me made. Next, there appears arising to me out of the farm and lands of Flemingstown, I hold by a lease of lives under the Right Honourable Lord and Lady Kingsborough, a profit rent of 233*l.* 10*s.* 5*d.* sterling at this day over and above the head rent of the same. I leave and bequeath to my dearly beloved and best of wives, Elizabeth Thornhill, 200*l.* yearly of the said profit rent, for her sole use and benefit during her life, and at her decease 50*l.* yearly out of the same to my eldest daughter Sophia Godsell, for her own sole use and benefit; this given more as a token of the great regard and affection I bear her, than thinking it necessary to give her any more, being sensible, in giving her the 1500*l.* she got as a marriage portion, I gave her a child's share, and got a suitable provision for her. The other 150*l.* yearly I leave to my wife, Elizabeth Thornhill, to bequeath to which of our children she thinks most deserving of it by their duty and affection to her, should she outlive me; should she not, I then leave it in the hands of my executors, to form a fund for the support of such of our

children as shall be a loser by the uncertain tenure of my property bequeathed to them. The rest of the profit rent of said farm of Flemingstown, being 33*l.* 10*s.* 5*d.* sterling, together with all future rises on it over and above the 200*l.* left to my wife, I leave to my fourth son, James Badham Thornhill, now a minor at school at Portalington, in part of what I intend for his support. This profit rent, with all the other profit rents and bequests of mine, if not sufficiently explicit in the return of profit rent here set forth, will be found in my new rent-book, made up for March 1794 (four). And whereas there appears in said rental, not including the house and demesne lands of Thornhill Lawn, over and above the head-rents of the same, a sum of 674*l.* 1*s.* 3½*d.* sterling, not charging the house and demesne lands, one hundred and fifty acres, though there is, I believe, better than eighty acres more, together with a very considerable rise on the same by the lands now out of lease, and to be set together with the benefit arising out of the same by the trees planted by me on said lands: now be it known, that I leave 600*l.* yearly of the said present rent, except the 74*l.* 1*s.* 3½*d.* sterling, arising out of the same, to my eldest son, Richard Badham Thornhill, now a Lieutenant in his Majesty's eighth regiment of Light Dragoons, together with all emoluments and benefits arising out of the same, except the above odd sum 74*l.* 1*s.* 3½*d.* sterling, arising out of the same, which I leave to my third son, George King Thornhill, for his own sole use and benefit, during the continuance and term in said lease, held likewise under the aforesaid Lord and Lady Kingsborough, and place every confidence in the honour, principle,

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and justice of the said Lord and Lady Kingsborough, they will perform, with their heirs and representatives, that promise and engagement the said Lord Kingsborough gave under his hand, on which the present testator, relying on the honour and justice of the said Lord Kingsborough and his family, did lay out and expend his whole property, and all the money he could command, on said lands of Thornhill Lawn, which is known to many persons now living, and visible to the kingdom, travelling the road to Cork, and made such improvements on it as no man in his Majesty's dominions ever did or ever would make on the estate of another; but the reliance placed in the said Lord Kingsborough and his family, which he has no doubt they will fulfil to his above sons. And whereas there also appears on the lands of Killeen, in the county of Limerick, taken from General Stratton by purchase, and by him taken from said Lord and Lady Kingsborough, over and above the head rent of the same, a profit rent of 25*l.* 3*s.* 4½*d.* sterling, at this day: Now be it known I leave and bequeath 200*l.* yearly of the above profit rent to my now second son, Robert King Thornhill, now a captain in his Majesty's Royal Irish regiment of Artillery, doing duty on the Continent, *for his own sole use and benefit, during the term of said lease*, being for mine, his own, and his brother George's life; the residue being 51*l.* 3*s.* 4½*d.* sterling, I leave to his brother, my now third son, George King Thornhill, for his own sole use and benefit; any benefit arising out of said lease of Killeen, by rise of rent or times, to be for the benefit of my said son Robert, except as before excepted. And whereas there also appears

out of the farm and lands of Lisnalaniff, taken from said Lord and Lady Kingsborough, a profit rent of 51*l.* 14*s.* sterling, at this day over and above the head rent of the same, during the lives of the said Robert and George: now be it known, that I leave and bequeath the same to my now said third son, George King Thornhill, together with all emoluments and benefits out of said lease, for his sole use and benefit during said term. And whereas there appears a profit rent arising to me out of a dwelling-house in the Square of Mitchelstown, and other houses and land near said town, a profit rent at this day of 48*l.* 11*s.* sterling, over and above the head rent of the same, being for leases of lives and years, and the lands for years only: now be it known, I leave and bequeath the same, with all benefits and advantages arising therefrom to my now fourth son, James Badham Thornhill, for his sole use and benefit. And whereas there also appears out of the lands of Coolenamahogue, taken from said Lord and Lady Kingsborough, and now in the tenancy and occupation of Dunlea, Lyne, and Shean, a sum or profit rent of 65*l.* 10*s.* sterling, over and above the head rent of the same: now be it known, I leave and bequeath the said profit rent, with all emoluments and advantages of said lease, to my son, James Badham Thornhill, except 10*l.* yearly of the same, which sum he is to pay yearly out of the same during said term to my fifth son, Badham Thornhill, his brother, now at Portarlinton school with him. And whereas there appears out of the lands of Knockanevin a lease I purchased from Hugh Inglesby Massy, esquire, under the said Lord and Lady Kingsborough, at this day as now set, a

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profit rent of 392*l.* 1*s.* 7½*d.* sterling out of the same, over and above the head rent of the same : now be it known, that I leave and bequeath 100*l.* yearly of the same to each of my three daughters, Ann, Caroline, and Elizabeth Thornhill ; the residue of the said profit rent, being 92*l.* 1*s.* 7½*d.* sterling, I leave to my fifth son, Badham Thornhill, for his sole use and benefit, together with all future benefits and emoluments arising out of the same, except as before excepted. And whereas there appears a profit rent of 79*l.* 15*s.* sterling, arising out of part of Thornhill Lawn, set by lease to Robert Lewis, not included or mentioned in the demesne and lands of Thornhill Lawn before mentioned : now be it known, I leave said rent, not subject to pay any part of the head rent, that being already paid by the demesne and lands of said place, the above profit rent, as follows, *viz.* 30*l.* yearly of the same to my daughter Ann Thornhill ; 29*l.* 15*s.* to my daughter Caroline ; and 20*l.* sterling to my daughter Eliza ; in addition to the sums of 100*l.* each left them out of Knockanevin, together with all future advantages, if any should arise out of the same, held by said Robert Lewis ; and further, *if any of the above legatees should die, or die unmarried*, I leave the property bequeathed to them, with all benefit arising out of the same, to be divided equally, share and share alike, among the survivor or survivors of them. And *also, in like manner*, if any of the lives in the leases should die, so as to leave any of the said legatees unprovided for, by the lapse or fall of said life or lives in any of the above bequests, that, in such case, a proportion shall be deducted from the bequest of each, to make up the deficiency by the

determination of such lease, as it shall so happen to fall, in proportion to the loss sustained, and in proportion of the property of the survivor or survivors. And whereas there appears due to me, out of the estate or property of Edward Badham Thornhill, Esq. of Castlekevin, which I have recovered from him by a final decree in the Court of Chancery, made up by one of the Masters of said Court, which, together with the interest since due, amounts to better than 3000*l.*; and also a sum of 500*l.*, with a large arrear of interest arising out of the same, due to me by the executors of the Reverend Thomas Bunbury, for which they have given me a bond of one Bradshaws, for the payment of the same, which I could not get. And whereas there also appears due to me by Samuel Godsell, Esq., a sum of money I was obliged to advance to Captain Coote, to discharge his share of the interest and reduce the principal of our bond passed to the said Coote for 1100*l.*, which principal sum is paid and reduced to 800*l.*, including the money paid by said Samuel Godsell from time to time, as will appear by our accounts of the same: now be it known, I leave the above sums to pay all the bond and judgments debts justly due of me, but not for others' debts I am security for; the residue or overplus of the same being, I am sure, of a large amount, I leave to be divided equally, share and share alike, among all my legatees, wife and children, mentioned in this will, Mrs. Godsell included, except twenty guineas I leave my foster brother, John Finn; the like sum to Simon Connors; the like sum to Catherine Connors; the like sum to James Lynch; and ten guineas to William Ryan, in token of my regards

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for them as true, honest, and faithful servants; to Ellen Shanahan five guineas; to Nell Finn two guineas; to Casey and Clifford, helpers, two guineas each. My house in Cork I leave to my said wife, Elizabeth Thornhill, with all the furniture, &c. contained therein, together with such of my furniture, plate, &c. as she may find necessary to keep for the use of her house. The residue of all my property, real and personal, to be sold and disposed of; 100*l*. of the same to be given to my said wife for her present support; the residue to be divided among my three daughters, Ann, Caroline, and Eliza, except my family plate; any left after my wife has taken what she wants, to be given to my eldest son, Richard, who is *to pay* my foster brother, John Finn, during his life, 10*l*. *yearly out of Thornhill Lawn*. For John Donovan, if living with me at the time of my decease, and Timothy Keogh, five guineas each. I appoint my wife, Elizabeth Thornhill, my acting executor in this will, and residuary legatee, as I entertain the highest opinion of her honour, principles, and justice. I also appoint Sir Charles Burton, Michael Green, esq. senior and junior, and Mr. William Wilstead, my assistant executors to my said wife, Elizabeth Thornhill."

The testator executed two codicils to his will, which are not material to the question at issue. He died on the 1st of December 1796, leaving his wife and all his children surviving him.

Upon the death of his father, Robert King Thornhill entered into the receipt of the rents and profits of the lands of Killeen and its subdenominations, and continued to receive the same until the year 1800; when, by an indenture, bearing date

the 20th April in that year, for valuable consideration he conveyed the same to Robert Hall, his heirs, and assigns, during the lives and life of Robert King Thornhill and George King Thornhill, who were the then surviving *cestui que vies* named in the head lease under which the lands were held by the testator, subject to the annuity of 51*l.* 3*s.* 4½*d.* bequeathed to George King Thornhill, and to an annuity of 170*l.* per annum, to be issuing out of the lands, and payable to Robert King Thornhill during his life.

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Immediately after the execution of the last-mentioned deed, Robert Hall entered into possession and receipt of the rents, issues and profits of lands of Killeen and its subdenominations; and soon after, the Appellant, Richard Badham Thornhill, wrote and sent to Robert Hall a letter, dated the 15th September 1800, which was as follows:—

“ I will make good to you the treaty of Killeen, in case I should have it in my power, to be declared and entitled as heir at law for my father’s property, or to do any act to fulfil my brother’s agreement with you, as far as those learned in the law shall advise, or that I have powers to that purpose.

(Signed) R. B. THORNHILL.”

By another deed, bearing date the 30th of June 1804, Robert King Thornhill, for valuable consideration, released the lands of Killeen and its subdenominations from the payment of the sum of 56*l.* 5*s.* per annum, part of the annuity of 170*l.*, reserved by the deed of the 20th April 1800.

By a further deed, bearing date the 27th day of January 1817, and made between Robert King Thornhill of the one part, and the Respondent of the other part, Robert King Thornhill, for other

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to the undertaking and agreement to that effect contained in his letter of the 15th September, 1800, and that the Appellants, or such of them as the Court should think bound so to do, might be obliged to repay to the Respondent the cost and expenses of the suit and of all the proceedings at law.

The Respondent obtained the common injunction, restraining the Appellants from proceeding at law, until answer or further order.

The Appellants put in answers to the bill, wherein they admitted the purchases made by Robert Hall from Robert King Thornhill; and Richard Badham Thornhill admitted that he wrote the letter above mentioned to Robert Hall. After the answers were put in, the Respondent moved the Irish Court of Exchequer that the injunction might be continued to the hearing of the cause; whereupon the Court was pleased, by an order bearing date the 12th day of May, 1827, to order that the injunction should be continued to the hearing; the Respondent undertaking to set down the cause to be heard on the pleadings on the first hearing day in the then next term, so as to take the opinion of the Court upon the construction of the testator's will.

The parties in the cause entered into a consent, bearing date the 28th of May, 1827, which was made an order of the Irish Court of Exchequer on the 16th of June following, to the effect that the only question to be discussed upon the hearing of the cause, should be the construction of the testator's will, and that the will should be read on the hearing as well proved.

The cause accordingly came on to be heard on the pleadings in the Irish Court of Exchequer, on the 28th June, 1827, when the Court pronounced

a decree, to the effect that the whole estate and interest of the testator in the lands in question passed by his will to Robert King Thornhill, except as to the annuity of 51*l*. 3*s*. 4½*d*., charged thereon by the will, in favour of George King Thornhill, and that the Respondent was entitled to all the estate and interest so devised to Robert King Thornhill, but subject to the last-mentioned annuity; and that the legal estate in those lands had descended on and was vested in the testator's heir, Richard Badham Thornhill, and that he was a trustee of such legal estate for the Respondent; and he was decreed to convey such legal estate to the Respondent, and an injunction was to issue to restrain the Appellants from proceeding with the ejectment, and to quiet and establish the Respondent in the lands, and that both parties were to bear their own costs at law and in equity.

The Appellants presented their petition of appeal against this decree.

For the Appellants, — Mr. *Tinney* and Mr. *J. Jervis*.

If the devise to R. K. Thornhill stood alone, the interest in the profit-rent for the whole term would have been absolute in him. But that interest is cut down to a life estate, with an executory devise, over by the general clause of survivorship. The "above legatees," named in that clause, can only refer to the several children of the testator, to whom different parts of the property had been before bequeathed, and, among the rest, to R. K. Thornhill. The survivorship was to operate if the children, or any of them, should die in the testator's lifetime, or at any time if unmarried. R. K. Thornhill died unmarried. If he had been mar-

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ried and become a widower, the words would have applied; *Bell v. Phyn*.* It is a good executory bequest over to the other children. Upon his death unmarried, his interest determined and passed over to the other children. The will parcels out the estates, and the last clause refers to the preceding clauses. What is given to the wife is given expressly for life. In the first bequest a provision is made as to all the subsequent bequests. It is said that the bequest of the 600*l.* profit-rent to R. Badham Thornhill must be an absolute interest, since debts may be payable out of it. But it may be subject, nevertheless, to the contingent executory bequest. The phrase "above legatees" would, in ordinary construction, apply to the whole preceding matter. "The same" refers to the next antecedent; but "above" is general and unrestricted. If grammatically and legally it is a word of general reference, the construction cannot be altered by conjecture. The testator parcels out among his children his whole property. The will is entire, and all the clauses are connected with the first. If the clause of survivorship had occurred in the middle of the will, it might have referred only to the preceding clauses; but it occurs at the conclusion of the will, as usual, where a provision overrides the whole instrument. It would have been very unusual, and a tedious tautology, to annex the clause of survivorship to every gift in the will. Having made provision for all the children, he naturally contemplates the events of death and survivorship, and provides accordingly. The provision immediately following, "that if any of the lives in the leases should die, so as to leave any of the said legatees unpro-

* 7 Ves. 458.

"vided for, the legatees should abate in proportion," shows the intention to extend the whole provision to all the legatees. The expression is "so as to leave any of the said legatees:" that must surely mean all the legatees; and it is in the same clause with the provision as to the "above legatees," although "said," like "same," usually refers to the next antecedent. The words "survivor or survivors" occur in both parts of the clause, so as to furnish an inference that he was dealing with the same subject-matter. Can the first part of the clause refer to daughters only, and the latter part to all the children? As to the reasons of the Respondent printed in his case, the word "above," applied to rent in the singular number, explains itself. The expression in the clause of survivorship could not apply to the wife, for when her interest in the fund ceased, it is limited to the children: she therefore could not be included, and a life interest only is given to her. It is absurd to imagine that he was speaking of his wife as dying unmarried. When he uses the expression "all my legatees," he includes his wife, and names her. "Above" refers only to the children, and they are not named.

That the provision is intended to apply to daughters, and not to sons, is mere conjecture; and the hypothesis fails in the application, since it must refer to Badham Thornhill as well as the daughters, for he is mentioned in the same sentence. But how is he differently circumstanced from his brothers to warrant the distinction? The profit-rent given to R. K. T., the son, is not given more absolutely than the profit-rent to the daughters; nor is there any reason why the interest of the one should be cut down rather than that of the other.

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It is argued, in the ninth reason of the Respondent's case, that if all the devisees are included in the clause of survivorship, it will extend to R. B. Thornhill, and then it might become impossible to pay the annuity to Phyn, if he should survive R. B. Thornhill, or to pay the debts charged upon the interest of R. B. Thornhill upon the happening of the event specified. But it is not necessary that the annuity to Phyn should continue beyond the interest of R. B. Thornhill. The testator might well have regarded more the interest of the surviving children in the bequest over, than the interest of the annuitant charged upon the rent. In *Wigg v. Wigg** it was held a personal condition affecting the devisee, not a charge on the land; and although the devise lapsed, the estate was held chargeable in the hands of the heir. As to the argument, that Sophia Godsell, being married at the date of the will, the clause could not apply to her, and therefore not to all the children; the clause, *primâ facie*, would apply to her, and she might, in the course of events, die unmarried; but the question is immaterial.

For the Respondents,—Mr. O'Connell and Mr. Bagshaw.†

It is material to bear in mind that R. K. Thornhill is one of the *cestui que vies* in the lease in question. In the clause of gift there is a perfect devise of the whole interest; and this is the will of an illiterate man. To cut down the estate so given, words should be pointed out of clear and express import, or operating by necessary implication. In the argument for the Appellant, no express words

* 1 Atk. 382.

† Mr. O'Connell only argued the case.

have been pointed out. They find words cutting down some general estate to a particular estate. But this could not apply to R. K. Thornhill, because, he being one of the *cestui que vies*, the estate might terminate with his life. Could it be intended that he should be comprehended in a clause which could be of no benefit to him?

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The argument, after all, can only raise a doubt, and that decides the case in favour of the Respondent; for if the clause of survivorship is ambiguous, which is assumed as the basis of the argument, the express devise must prevail. The testator makes a manifest distinction between the provision for sons and for daughters. The first devise is of a profit-rent out of lands to his widow for her life. It is argued that she could not die unmarried: that is a singular proposition, especially considering the argument from doctrine of *Bell v. Phyn*, as applied to R. K. Thornhill. From the apology made by the will for not giving more to his daughter Sophia, it seems that 1500*l.* was the money portion which he wished to give, and considered as given, to his daughters. It is difficult to imagine that the word "*above*" can refer to all the preceding clauses. The first and the second clauses contain separate and distinct devises; the third is an absolute gift to his son R. K. Thornhill; the fourth is a gift of interests in lands for terms of years as well as lives. Can the words "*above legatees*" refer to all these different subjects and objects of his bounty? They appear to refer only to legatees who might be disappointed by the falling in of lives. The estate given to some of the legatees is charged with debts and annuities for life. This always leads to a necessary inference

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valuable considerations, assigned to the Respondent the residue of the annuity of 170*l.* granted to Robert King Thornhill by the deed of the 20th of April, 1800.

By indenture bearing date the 30th day of May, 1819, Robert Hall conveyed the lands of Killeen, Ballyhourahan, and Ballyfaskeen, with other estates and interests therein mentioned, upon certain trusts therein mentioned, for the benefit of Robert Hall, and Catherine his wife, for their respective lives, and after the death of the survivor of them in trust for the benefit of the Respondent: and upon the death of the survivor of them, the Respondent, by virtue of the will and deeds above mentioned, subject to the annuity of 51*l.* 3*s.* 4½*d.*, entered into, and has ever since been, and is now, in the receipt of the rents and profits of the lands of Killeen and its sub-denominations.

Robert King Thornhill died on the 1st August, 1825, without having been married, and left the Appellants, Elizabeth Thornhill, his mother, and his brothers Richard Badham Thornhill, George King Thornhill, James Badham Thornhill, and his sisters Anne Rye and Sophia Godsell, surviving; his other brother and two sisters having died in his lifetime: and the Appellants upon his death claiming to be equally entitled, share and share alike, to the interests in the lands bequeathed to him by the testator's will in Easter term, 1826, brought an action of ejectment, in the Pleas side of his Majesty's Court of Exchequer in Ireland, for the recovery of the possession of those lands.

The cause was tried at the Limerick Summer Assizes of 1826, when a special verdict was agreed upon by the counsel on both sides, for the purpose

of having the opinion of the Irish Court of Exchequer upon the construction of the will of the testator with respect to the devise to Robert King Thornhill. The special verdict came on for argument before the Irish Court of Exchequer in Michaelmas term, 1826, and the Court on the opening of the cause suggested that the devise to Robert King Thornhill passed no more than an equitable interest to him, and that the legal estate in the lands comprised in the devise had descended upon, and was vested in, the Appellant Richard Badham Thornhill, as the heir-at-law of the testator; and the Court was pleased to respite judgment upon the special verdict until the then ensuing Hilary term, for the purpose of enabling the Respondent, in the interim, to file a bill against the Appellants to restrain their further proceeding in the ejectment suit.

The Respondent accordingly, in January, 1827, filed his bill on the Equity side of the Irish Court of Exchequer against the Appellants, and prayed that they might be restrained by injunction from proceeding further in the ejectment suit, and that the Respondent might be decreed to be entitled to the estate and interest in the lands of Killeen, Ballyhourahan and Ballyfaskeen, devised to Robert King Thornhill for the lives of the *cestui que vies* named in the lease of those lands, and that he might be quieted in the possession and enjoyment thereof; and that, if necessary, the Appellant, Richard Badham Thornhill, might be declared a trustee for the Respondent in respect to those lands and premises, and might be decreed to execute all such deeds as might be necessary to validate the title of the Respondent thereto, pursuant

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to the undertaking and agreement to that effect contained in his letter of the 15th September, 1800, and that the Appellants, or such of them as the Court should think bound so to do, might be obliged to repay to the Respondent the cost and expenses of the suit and of all the proceedings at law.

The Respondent obtained the common injunction, restraining the Appellants from proceeding at law, until answer or further order.

The Appellants put in answers to the bill, wherein they admitted the purchases made by Robert Hall from Robert King Thornhill; and Richard Badham Thornhill admitted that he wrote the letter above mentioned to Robert Hall. After the answers were put in, the Respondent moved the Irish Court of Exchequer that the injunction might be continued to the hearing of the cause; whereupon the Court was pleased, by an order bearing date the 12th day of May, 1827, to order that the injunction should be continued to the hearing; the Respondent undertaking to set down the cause to be heard on the pleadings on the first hearing day in the then next term, so as to take the opinion of the Court upon the construction of the testator's will.

The parties in the cause entered into a consent, bearing date the 28th of May, 1827, which was made an order of the Irish Court of Exchequer on the 16th of June following, to the effect that the only question to be discussed upon the hearing of the cause, should be the construction of the testator's will, and that the will should be read on the hearing as well proved.

The cause accordingly came on to be heard on the pleadings in the Irish Court of Exchequer, on the 28th June, 1827, when the Court pronounced

a decree, to the effect that the whole estate and interest of the testator in the lands in question passed by his will to Robert King Thornhill, except as to the annuity of 51*l*. 3*s*. 4½*d*., charged thereon by the will, in favour of George King Thornhill, and that the Respondent was entitled to all the estate and interest so devised to Robert King Thornhill, but subject to the last-mentioned annuity; and that the legal estate in those lands had descended on and was vested in the testator's heir, Richard Badham Thornhill, and that he was a trustee of such legal estate for the Respondent; and he was decreed to convey such legal estate to the Respondent, and an injunction was to issue to restrain the Appellants from proceeding with the ejectment, and to quiet and establish the Respondent in the lands, and that both parties were to bear their own costs at law and in equity.

The Appellants presented their petition of appeal against this decree.

For the Appellants, — Mr. *Tinney* and Mr. *J. Jervis*.

If the devise to R. K. Thornhill stood alone, the interest in the profit-rent for the whole term would have been absolute in him. But that interest is cut down to a life estate, with an executory devise, over by the general clause of survivorship. The "above legatees," named in that clause, can only refer to the several children of the testator, to whom different parts of the property had been before bequeathed, and, among the rest, to R. K. Thornhill. The survivorship was to operate if the children, or any of them, should die in the testator's lifetime, or at any time if unmarried. R. K. Thornhill died unmarried. If he had been mar-

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survivorship to the preceding legacies of 100*l*. If it is held to comprise the profit-rent given to Badham beyond the 100*l*., it is a much more probable construction, does less violence to the instrument, is more according to the apparent intent of the testator, than the supposition of reference to all preceding legacies by the words "above legatees." If he meant to give to Robert a life estate in the lease, the obvious expression would have been, "I give to Robert an interest in this leasehold for lives (one of which was his own), for his own life, and no longer." As the life of the donee was one of those upon which the estate was held, the attention of the testator was naturally, and almost unavoidably, invited to this mode of expression, if he so intended. A more clumsy and circuitous mode of expressing the intention supposed in the argument, than that which is to be found in the will, cannot be imagined.

I have not forgotten the argument urged by Mr. O'Connell, that there is the appearance of a charge upon the leasehold which might endure beyond the life of Robert. It may not be perfectly clear, but if it is so, that fact would be decisive of the question. I, however, ground my opinion upon the parts of the will which I have cited; and I move that the judgment be affirmed with costs.

Judgment affirmed with costs not exceeding 150*l*.

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ENGLAND.

(COURT OF CHANCERY.)

GEORGE WILFORD BULKLEY *Appellant;*
ANNA WILFORD - - - *Respondent.*

W., being seised of lands at R., entered into a contract for the sale of part of those lands; and the title being complicated, the purchaser required that a fine should be levied of the lands under contract of sale. In this business W. employed B. as his solicitor, he being his heir presumptive. Under the advice of B. a fine was levied, not only of the lands sold, but of all the lands at R. belonging to W. Before the contract for sale W. had made his will, devising his real estate to his wife. W. died a few months after levying the fine; and in conversations shortly after his death, R. used expressions which imported that, at the date of the conversations at least he knew that W. had made a will before the fine levied, and that the operation of the fine would be to revoke the will. He also, in answer to a representation that he ought to have apprised W. of that consequence, said, "Why should I put a sword into his hand to cut my throat?"

Upon a bill filed in equity by the widow, and an answer admitting the employment as solicitor, and the advice to levy the fine, but denying knowledge or belief that a will had been executed by W., and also denying knowledge that a fine would operate to revoke the will, issues were directed to a court of law to try, 1. Whether the Defendant fraudulently induced W. to extend a fine levied by him beyond property sold to the commissioners, &c.; 2. Whether the Defendant fraudulently omitted to inform W. that the fine would revoke his will as to the lands comprised therein; and the jury having found a verdict for the Plaintiff upon the second issue, Held, that R. was properly declared and decreed to be a trustee for the devisee.

Whether such decree ought not to have been made upon the evidence in equity without directing issues.—*Quære.*

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IN the month of June, 1823, the Respondent, Anna Wilford, filed her bill in the Court of Chancery against the Appellant George Wilford Bulkley and others, which bill was afterwards amended; and it was thereby alleged, that Richard Rich Wilford (the testator in the bill named) was, at the time of making his will, seised in fee simple of the following lands and hereditaments (that is to say): the mansion house or dwelling house called Ranelagh House, with the land, stable, and coach-house thereto adjoining, together with two other pieces of land, also thereto adjoining, in one whereof there were five tenements erected, and in the other one tenement; the whole of the said mansion house, lands, and tenements comprising about two acres; which premises, or great part (particularly the mansion house), had been devised to him by the will of his father, who died in the year 1789, and the residue thereof purchased by him of sundry persons upwards of twenty years prior to filing such bill; that he was also in like manner entitled to another estate nearly adjoining thereto, commonly called the Ranelagh estate, comprising eighteen acres of land or thereabouts, with twelve messuages thereon erected; that the said Richard Rich Wilford, whilst of sound and disposing mind, signed and published his will, dated on the 28th day of March, 1822, and which was attested as by law is required for passing freeholds by devise, and thereby devised and bequeathed all and every his messuages, lands, tenements, hereditaments, and real estates whatsoever and wheresoever, and the residue of his personal estate, unto the Respondent, her heirs, executors,

administrators, and assigns for ever, and appointed her and Joseph George Brett, and William Augustus Cane, executrix and executors of his said will; and that, by virtue of such will, she was in possession of some part of the said testator's real estates, and particularly of the mansion house, in which the testator had for upwards of thirty years before his death resided; but that the Appellant, George Wilford Bulkley, was in possession of other part thereof; and further alleging that previously to the making of his will, the testator had entered into a contract with John Lawrens Bicknell, gentleman, on the behalf of the then commissioners and governors of the Royal Hospital for soldiers at Chelsea, for the sale to them of part of the said land called the Ranelagh estate, in consideration of 9000*l.*, which contract was reduced into writing, and signed by the said John Lawrens Bicknell as the agent of, and on the behalf of the said commissioners and governors; and the premises so contracted to be sold, were to be conveyed to the said John Lawrens Bicknell, as a trustee for the said commissioners and governors, and that the testator's title to some part of the said property called the Ranelagh estate was complicated, the said estate having formerly been held by trustees in trust, for certain shareholders therein, which shares were thirty-six in number; and the titles to most of the said shares being separate and distinct; and in consequence of such complication, doubts arose respecting the testator's title to a part of the land so contracted to be sold; that it was therefore agreed, and formed part of the said contract with the said commissioners and governors, that the testator should, with a view to the completion of the said

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contract, levy a fine of the said land so contracted to be sold to the said commissioners and governors, and that the Appellant, who had been employed by the testator for several years before as his attorney, and who had done much business for him as his attorney, was the attorney employed by the testator on the sale ; and further alleging that the Appellant, who from the conversations he had with the testator on the subject and otherwise, well knew, or believed, or suspected, that the said testator had made a will, and thereby left his real estates to Respondent, or to some other person, and who believed or considered himself to be at that time, and at the time of the levying of the fine hereinafter mentioned, as he actually was, the heir presumptive of the said testator, formed a scheme of causing the said testator to levy a fine which should in law include the whole of his said property, and thus revoke his will. And which, from the confidence reposed in him by the said testator as his attorney, he knew he should be able to effect ; and that with such view and design the Appellant advised the said testator not to limit the fine which was intended to be levied as aforesaid, to that part of the premises called the Ranelagh estate, which was contracted to be sold, but to levy a fine of the whole of premises called the Ranelagh estate, alleging that it would add little to the expense, and that by so doing, he would strengthen his title to the whole estate. And further alleging, that the testator being wholly ignorant of the effect of levying such fine, consented to act therein, as advised by the Appellant, and accordingly a fine *sur conuzance de droit come ceo*, &c. was by the procurement of the Ap-

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pellant, who acted therein as the attorney of the testator, levied in or as of Michaelmas term, in the year 1822, wherein John Lawrens Bicknell was Plaintiff, and the testator and the Appellant were deforciants of twenty messuages, twelve gardens, twenty acres of land, twenty acres of meadow, twenty acres of pasture, five acres of wood, and five acres of land covered with water, and the appurtenances in Chelsea, and that the Appellant caused the name of John Lawrens Bicknell to be inserted in the fine, as the Plaintiff, in order more effectually to conceal his design both from the testator and from the Respondent, and that the same might appear to have arisen out of the contract, and that the Respondent might be the more readily induced to consent to join in such fine; and the Appellant, although he inserted in the fine such a number of acres as would in law comprise the whole of the testator's property at Chelsea, took care to insert twelve messuages only, in order that the testator, in case he should look into any of the documents, might have no suspicion that any other property belonging to him was included in the fine than his property called the Ranelagh property, on which there were exactly twelve messuages; and in order to induce the Respondent to join in the fine, the Appellant not only represented to her that it was necessary to confirm the title to such part thereof as had been sold, but he also represented to her, in the presence of the testator, that it would strengthen and confirm his title to the residue of the property; and further alleging that the Appellant also, in furtherance of such fraudulent design, as aforesaid, did not state to the testator that the levying of

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such fine would at law operate as a revocation of any will he might have made to any extent, but concealed the same from him ; and the testator was, as the Appellant was aware, wholly ignorant that the fine would have any such operation, and that no uses were declared of the fine ; that the testator died on or about the 20th day of December, in the year 1822, seised of all the before-mentioned lands and premises, and without having altered or revoked his will, save at law, by the fine, and leaving the Respondent his widow, but no children, or brothers, or sisters, him surviving.

That shortly after the death of the testator, the Appellant, conceiving that the fraudulent purpose he had intended to effect as aforesaid, was completed, wrote, and sent a letter to the Respondent, which was in the words and figures, or to the effect following, that is to say,

“ MADAM,

“ *Chelsea, April 3. 1823.*

“ From motives of respect and delicacy towards
“ you, and a wish to avoid the appearance of pre-
“ cipitancy, I have hitherto forborne making any
“ formal entry upon a claim to the property,
“ which, as the legal representative of General
“ Wilford, has devolved upon me in consequence
“ of the General’s intestacy. From the same con-
“ siderations, I refrained adopting certain mea-
“ sures which prudence and policy dictated two
“ months ago, in support of my title, but the
“ period is now drawing nigh beyond which longer
“ forbearance will be impracticable, without com-
“ promising the interests of my family in a way
“ that could not on any grounds be justified.

“ Therefore, I now beg leave to inform you,

“ that in the character of the General’s heir-at-law,
 “ *I claim all those estates in Chelsea*, whereof the
 “ General died seised, and all benefit arising from
 “ the same from the day of his decease. That as
 “ to such portions of those estates as is in your
 “ occupation, I request from you either a recog-
 “ nition of my right, or a tender of possession,
 “ with payment of an adequate rent during the
 “ period of your occupancy.

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“ In the event of your non-compliance with
 “ either of my requests, I shall be under the
 “ necessity of making a formal entry upon the
 “ premises previous to the adoption of further
 “ measures.

“ As to that portion of the estate which is in the
 “ hands of tenants, I shall require of such tenants
 “ payment of their rent for my own use, and an
 “ atonement to me in every case, for the premises
 “ they respectively occupy.

“ I trust you will not conclude that I wish to
 “ put you to one moment’s inconvenience : so far
 “ from such being my wish or desire, that I would
 “ make any reasonable sacrifice to avoid it, but the
 “ existing state of things is such, that from the
 “ extreme age of one witness, and the infirmity of
 “ another, that in case of proceedings becoming
 “ necessary, in consequence of a refusal to comply
 “ with my request, such proceedings cannot be
 “ delayed beyond the 12th instant.

(Signed) “ G. W. BULKLEY.”

And further alleging that the Appellant, as the
 heir-at-law of the testator, had ever since continued
 to claim to be entitled to the whole of the real
 estates of the testator, alleging that such fine
 operated as a revocation of the will, and he had

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then lately commenced an action of ejectment against the Respondent, to recover the possession of the whole of the testator's real estates in Chelsea, including his mansion-house and premises, and that the Respondent not being able to make any defence at law to the action, as to so much of the property as is included in the fine, the Appellant would recover a verdict for the same.

The Bill prayed that it might be declared that the Appellant was a trustee for the Respondent of the whole of the lands, tenements, and hereditaments belonging to the testator, which had descended to him as heir-at-law, excepting such part thereof as was included in the contract with the Governors of Chelsea Hospital; and that it might also be declared, that the Respondent, or Joseph George Brett and William Augustus Cane, were entitled to receive the purchase money of the land contracted to be sold to the Commissioners and Governors of Chelsea Hospital as aforesaid; and that the Appellant might be decreed to join with the Respondent in making a title to the said lands, and in conveying the same to the surviving commissioners and governors, or their trustees; and that thereupon the said commissioners and governors might be decreed to pay to the Respondent, or to Joseph George Brett and William Augustus Cane, the purchase money according to the terms of the contract; and that the Appellant might be decreed to convey to her in fee, or as she should direct, all such estate, right, and interest as had descended to him as aforesaid in all the lands and premises not comprised in the contract; and that in the mean time he might be restrained by the injunction of the said Court of Chancery

from further proceeding in the action of ejectment, or at least from suing out execution on any judgment he might recover therein, and from commencing any other action at law against the Respondent respecting the freehold lands, tenements, and hereditaments, which belonged to the testator, or in case the Court should be of opinion that the Appellant was entitled to recover and hold beneficially as such heir-at-law, or co-heir-at-law as aforesaid, any part of the testator's said lands, tenements, and hereditaments, then that it might be declared that Respondent was entitled to dower out of the whole of such lands, tenements, and hereditaments to which the Appellant should appear to be so entitled; and that such dower might be duly set out for the Respondent by metes and bounds accordingly in the usual manner, and that all proper directions might be given for carrying into effect the purposes aforesaid.

The Appellant by his answer admitted the will, and the contract with Chelsea Hospital, prior to the date of the will, and that the Ranelagh estate was held in trust for certain share-holders, and that such shares were thirty-six in number, and that the titles to most of the said shares were separate and distinct; and that, in consequence of such complication, doubts arose respecting the testator's title to the land, as contracted to be sold, and which doubts equally applied to the residue of the Ranelagh estate, not contracted to be sold, and which did, as thereinbefore mentioned, lie intermixed with and was incapable of being distinguished from the other real estates of the testator; and that it was agreed, and formed part of the contract

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with the said commissioners and governors, that the same Richard Rich Wilford should, with a view to the removal of such doubts, and the completion of the said contract, levy a fine of the said land respecting the title to which such doubts had arisen, and which doubts did as aforesaid extend to the residue of the said Ranelagh estate, and for the removal of which doubts as to all the said Ranelagh estate, the fine levied as in the Bill mentioned, was made to include the residue of such property. And he admitted that he had been employed by Richard Rich Wilford, and had done much business for him as his attorney; and that he was the attorney employed by Richard Rich Wilford on the said sale; but the Appellant denied that the testator's will was prepared or made by the Appellant, the same having been prepared and made by Messrs. Ashmore, Few, and Hamilton, who were the Respondent's solicitors in the suit; and he denied that he knew, or believed, or suspected, or had any reason to know, believe, or suspect, that Richard Rich Wilford had made a will, and that he thereby left his real estate to the Respondent, or to any other person; that on the contrary, he believed, until after the death of Richard Rich Wilford, that he had not made any will, inasmuch as Richard Rich Wilford, a very short time previous to his death, expressed a hope to the Appellant that the sale to the said Commissioners and Governors of Chelsea Hospital would be soon completed, and that he should immediately after the completion of the said sale settle his affairs, by which expressions the Appellant understood him to mean, that he would make his will, and he denied that he had at or about the

time in the Bill mentioned, or at any other time, any conversation with the said Richard Rich Wilford on the subject of his will, except as aforesaid; the Appellant said that he, at the time of the levying the fine in the Bill mentioned, believed that he was related to Richard Rich Wilford, and that it was probable he was his presumptive heir, but he did not know himself to be such presumptive heir, the relationship between him and the said testator being distant; and that the solicitors of the said Commissioners and Governors of Chelsea Hospital required, that a fine, *sur conuzance de droit come ceo*, &c. should be levied by the testator of that part of his property which he had contracted to sell to them as aforesaid, for the purpose of removing some alleged objections or defects in the title thereto; and the Appellant having been advised, and believing that such objections or defects applied equally to the title to the whole of the testator's estate called Ranelagh estate, and which Ranelagh estate, consisting of eighteen acres, or thereabouts, of land, with divers buildings thereupon, surrounded and lay intermixed with, and could not easily be distinguished from the said testator's other estates at Chelsea aforesaid, consisting of nearly two acres of land, with the buildings thereupon, in consequence of the said testator having many years ago destroyed the boundaries between such respective estates, and made various alterations and improvements therein, and converted considerable parts of all the said estates into a paddock and pleasure grounds, occupied altogether by the said testator himself with his dwelling-house; and being also advised, that if a fine were to be levied, which should include the

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whole of the said testator's estates at Chelsea, it would have the effect of strengthening and corroborating the titles thereto, and would not in any manner prejudice the said titles, and that the expense of such fine would not be much greater than the expense of a fine which should comprise only that part of the said estate which was contracted to be sold by the said testator as aforesaid; he (Appellant) under the circumstances and for the reasons thereinbefore-mentioned, did not confine the fine which was intended to be levied, to that part of the said premises called the Ranelagh estate, but extended it in the description of the parcels in such fine to the whole of the said premises called the Ranelagh estate, and all the said other estates at Chelsea aforesaid, which lay intermixed with, and undistinguishable from, such Ranelagh estate; but he denied that he ever formed the scheme of causing Richard Rich Wilford to levy a fine which should in law include the whole of his property, for the purpose, or with the view of revoking his will, the Appellant not knowing, until after the testator's death, that he had made a will; and he admitted, that under the circumstances, and for the reasons aforesaid, he alleged to, and informed the testator (as the truth was) that such fine would strengthen his title to his said estates, but denied that (save as aforesaid) he made such allegation or statement, as in the Bill mentioned, or to some such effect, and denied that, save as aforesaid, he gave any advice to Richard Rich Wilford relative to levying such fine; but admitted, that under the circumstances, and for the reasons aforesaid, the said fine was levied by his advice, and that it was at his suggestion made to cover twenty acres of

land for the purpose of comprising the whole of Richard Rich Wilford's estates at Chelsea, in order to strengthen and confirm the title to the whole thereof; he denied that Richard Rich Wilford was wholly ignorant of the effect of levying such fine, but he supposed the same would have the effect of corroborating and strengthening the title to the whole of his said estate at Chelsea, he having, in manner aforesaid, been informed by the Appellant that it would have such effect; and he admitted, that for the reasons and under the circumstances aforesaid, Richard Rich Wilford consented to act, and acted therein, as advised by Appellant, and which fine, as in the said Bill particularly mentioned, was accordingly levied in or as of Michaelmas term 1822, and that the Appellant caused the name of John Lawrens Bicknell, to be inserted in the fine as the Plaintiff, but denied that he did so for such reason and with such view as in the Bill mentioned, but merely because he considered it immaterial what person should be the Conuzee in the fine, and John Lawrens Bicknell occurred to him as being a proper person to be named such Conuzee, inasmuch as his name was in the contract between the testator and the said Commissioners and Governors of Chelsea Hospital, and he was the agent of the said Commissioners and Governors, and because the Appellant understood that the conveyance of the land contracted to be sold to Chelsea Hospital was to be made to John Lawrens Bicknell as a trustee for the said Commissioners and Governors, and that the Appellant did, for the reasons and purposes thereinbefore-mentioned, insert in the fine such a number of acres as would in law comprise the whole of the testa-

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tor's property at Chelsea, but denied that he did, for such reasons and with such view as in the said Bill mentioned, insert twelve messuages only therein, because he did not think it in any way material what number of messuages was stated therein, so that the land (which was the principal and most valuable part of the said property) was wholly comprised in the said fine, and because many of the erections and buildings on the said estate, which are termed messuages or tenements in the said Bill, are in truth porter's lodges, servants' and labourers' cottages, and offices of minor description, occupied with, and belonging to, the messuage occupied by the testator himself at his death, and would, as the Appellant was advised and believed, pass as the appurtenances of such messuages, without being distinctly specified or enumerated, although Appellant admitted that he did not inform Richard Rich Wilford, that the levying of such fine would, at law, operate as a revocation of his will to any extent, as well because the Appellant was never consulted by Richard Rich Wilford upon that subject, and did not know or believe, that he had executed any will, as because Appellant's attention or consideration was not drawn by any circumstance whatever, to the effect of the fine in such respect, and he did not know, until he was informed thereof by a conveyancer several days after the testator's death, that the testator's will was revoked, or had been affected to any extent by the fine; yet he denied that he did, otherwise than as aforesaid, wholly conceal from Richard Rich Wilford that the levying of such fine would, at law, operate as a revocation of his will to any extent; that he did not know, save as aforesaid,

whether the said Richard Rich Wilford was or was not wholly ignorant that the fine would have any such operation as in the Bill mentioned; and the Defendant admitted that no uses were declared of the said fine, Richard Rich Wilford having died very suddenly on or about the 20th of December 1822, a few days after the completion of the fine; he admitted that the testator left no children, or brothers, or sisters,; he admitted the letter dated 3rd April, 1823, but denied the fraud imputed. He admitted that he continued to claim the property as heir-at-law; and had brought an action of ejectment in Common Pleas.

The answer of the Appellant to amended bill, sworn 13th November, 1823, contained nothing material to the point adjudged. A supplemental bill was afterwards filed to restrain another action in the King's Bench.

The Respondent replied to the answers of the Appellant; issue was joined in the cause, and witnesses examined on both sides, and publication passed in Michaelmas Term, 1825; and the cause being set down for hearing, came on to be heard before the Vice-Chancellor, on the 23d of February, 1826, when his Honour, amongst other things, ordered that the parties should proceed to a trial at law in his Majesty's Court of King's Bench at Westminster, at the sittings in Easter Term then next, or at such other time as the Lord Chief Justice of that Court should direct, on the following issues: 1st, Whether the Appellant George Wilford Bulkley fraudulently induced the testator, Richard Rich Wilford, to extend the fine levied by him beyond the property agreed to be sold to the Commissioners and Governors of the Royal Hospital at

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Chelsea ; 2d, Whether the said Appellant George Wilford Bulkley, fraudulently omitted to inform the testator that such fine would, as to the property comprised therein, revoke any will of the said testator which might be in existence : and in such issue the Respondent was to be Plaintiff-at-law, and the Appellant was to be Defendant-at-law, who was forthwith to name an attorney to accept a declaration, appear and plead to issue.

The Respondent presented her petition of appeal against the decree to the Right Hon. the Lord Chancellor, stating that by an order of the Vice-Chancellor, bearing date the 26th day of January, 1825, it was ordered that the Appellant should be restrained by the injunction of the Court from suing out a writ of possession, or further proceeding in the action of ejectment in the pleadings of the cause mentioned to have been brought by him against the Respondent, until the hearing of the cause, or the further order of the Court; and also stating the decree, dated the 23d day of February, 1826: and that the Respondent was advised that the decree, so far as the same directed the trial of the issues therein mentioned, was erroneous, and praying that the decree might be varied, by declaring that the Appellant was a trustee for the Respondent of the whole of the lands, tenements, and hereditaments late belonging to the testator, which had descended to him as heir-at-law, except such part as was included in the contract with the Governors of Chelsea Hospital.

The petition of appeal was set down, and came on to be heard before the Lord Chancellor, the 5th May, 1828, when his Lordship ordered that the order, dated the 23d day of February, 1826, be

affirmed; and it was ordered that any special matter might be endorsed on the postea.

In pursuance of the decree and order, James Trower, the master to whom the cause stood referred, settled the issues directed by the decree and order on appeal, and in pursuance thereof the parties proceeded to a trial at law, at the sittings after Easter Term, 1829, at Westminster, before the Chief Justice of the King's Bench; when the Jury, upon the first issue, found that the Appellant, did not fraudulently induce Richard Rich Wilford to extend the fine levied by him beyond the property agreed to be sold to the Commissioners and Governors of the Royal Hospital at Chelsea; and as to the second issue the jury found, that the Appellant did fraudulently omit to inform Richard Rich Wilford that the fine would, as to the property comprised therein, revoke any will of Richard Rich Wilford, which might be in existence at the time when such fine was levied.

The Respondent, on the 3d day of July, 1829, signed judgment in the Court of King's Bench, at Westminster, upon the second issue. The Appellant, on the 15th of July, 1829, applied by motion to the Lord Chancellor for a new trial of the second issue; but his Lordship did not think fit to make any order upon the motion.

The cause came on to be heard on further directions on the 30th of July, 1829, before the Lord Chancellor, when *it was declared*, that, having regard to the finding of the Jury on the second issue, and having regard to the evidence produced and read in the cause, the Appellant, the heir-at-law of Richard Rich Wilford, ought not to be permitted to take advantage of the fine levied by the testator;

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and that the whole of the lands, tenements, and hereditaments, in the pleadings mentioned, excepting such part thereof as was included in the contract with the Governors of the Chelsea Hospital, ought to be considered as having passed by his will to the Respondent; and that the Appellant should convey to her in fee, or as she should direct, all such estate, right, and interest, as had descended to him as aforesaid, in all the lands, tenements, and hereditaments, not comprised in the said contract. And it was ordered that it should be referred to the master to whom the cause stood referred, to settle the conveyance in case the parties differed about the same. And in the meantime, that the Appellant be restrained by injunction from commencing or prosecuting any other action at law against the Respondent respecting the said freehold lands, tenements, and hereditaments, lately belonging to the said testator, and it was ordered that the Appellant should deliver up possession to the Respondent of such of the said lands and premises as were then in his possession. And it was ordered, that it should be referred to the master to take an account of the rents and profits of the real estate of the said testator accrued since his death, which had been possessed or received by the Appellant, or by any person for his use. And in order thereto, the parties were to produce before the master, upon oath, all books, papers, and writings in their custody or power, relating thereto, and were to be examined upon interrogatories, as the said master should direct, who, on taking the said accounts, was to make unto the parties all just allowances. And it was ordered, that the Appellant should pay to the Respondent what should be

reported due on taking such accounts. And it was ordered, that the Appellant should be restrained, by the injunction of that Court, from receiving any further rents of the said lands, tenements, and hereditaments, late belonging to the said testator; and that he should deliver up, on oath, to the Respondent, all deeds, papers, and writings, in his possession, relating to the same.

The following evidence, as it appeared by the notes of Lord Tenterden, was given upon the trial of the issues:—

Mary Wilcox lived in testator's service from about twelve years of age, daughter of an older servant; was with him twelve or thirteen years: I often saw the Defendant there with the testator, conversing; I was at home with my mother on account of my bad health; at his death she lived in one of the testator's houses, very near to him; Defendant called at my mother's on the Saturday after the testator's death (he died on Thursday or Friday) between one and two; I was helping to clean the house; he came into the parlour; I went in a little afterwards; he said, well, how do you do, Mary? — so the poor General is dead; he has not left you a farthing; you will not get your fortune; never mind, there is a flaw in the will; the property is mine, and I will take care of all of you.

Cross-examined: Mrs. W. lived with him when I first lived; she is now between sixty and seventy; I mentioned the conversation to my mother a week or ten days ago; my mother is now a tenant of Mrs. W.; I have been at home lately, and we were talking about this cause; my mother was in the parlour when I went in; when I told her of

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this, she said she did not hear it; a small room; we were all standing; Defendant was coming out, but stopped to speak to me; I have lived at different places since I was married; have seen my mother occasionally.

Re-examined: My husband is a carpenter; not employed by Mrs. W.

J. Lawrence Bicknell, solicitor to Chelsea Hospital: The testator's property adjoined; there was a treaty for purchase in 1819 and 1820; Defendant said there had been a former contract for sale, and a difficulty in finding the heir-at-law of one of the parties; but he did not consider it any difficulty; I did, and required a fine to be levied of the part that was to be bought by the hospital. It was a matter of no moment, who was conuzee: if a fine is levied for a purchase, at the requisition of the purchaser's attorney, it is usual to name him as the conuzee; if only to confirm a title, the practice varies very much; the draft of the conveyance was approved by Defendant, but not executed before testator's death; I received a note from Defendant mentioning his death; I saw Defendant soon afterwards; soon after the death; the note is dated 9th January, 1823; I can't speak minutely to conversations; Defendant said the testator had levied a fine before his death, and the fine revoked his will, and he doubted whether he should execute the conveyance to the hospital, as he was the heir-at-law; I told him I should call upon the executors to make the heir-at-law join; although the money would go to the executors, he expressed a doubt whether the hospital could purchase. I saw Brett afterwards, and then saw the Defendant afterwards at the Green Man; in

consequence of what I had heard, I told him great fault was found with him for having had a fine levied, and not informing the testator of the effect of it; he said, either I don't see why I should put a sword into the General's hand to cut my throat, or why should I, &c.; he said if the testator had lived a few days longer he had no doubt he would have re-executed or republished his will.

Cross-examined: Most undoubtedly Defendant endeavoured to persuade me that no fine was necessary; the money to be paid was 9000*l.*; looks at a letter produced by Defendant; I have no doubt I saw him before the 30th of January, in my own office at Greenwich. The last conversation was the last Saturday in February or in March; our turn-pike meetings were only on the last Saturday in the month; it could not have been more than five minutes long; he was coming by the way from our office at Greenwich; he had come about the abstracts; the purchase was not completed till three years afterwards; thirty-seven shares in the property. Basevi was our conveyancer; I had required the fine before I consulted him. Read Contract 12th August, 1820.

For Defendant: Dr. Brown, Medical, have attended Hugh Smith; saw him two days ago; he was not then in a state to come to London from Stoke, twenty miles from town; asthma; not likely to be fit to travel for a day or two.

Solicitor-General, Defendant, should put in the order for reading the deposition of Smith.

Scarlet refuses to do so; Solicitor-General withdraws his objection.

Bulkley, Defendant's son, produces examined

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copy of deposition of Smith ; — I was in the habit of seeing the testator ; he was kindly disposed to my father's family ; he got me my situation in the Stamp Office, and my brother a cornetcy in his regiment, 7th Dragoon Guards ; he got a cadetship for my second brother ; placed my fourth brother in Christ's Hospital School. Read copy deposition of Hugh Smith, aged seventy and upwards. Answer to the interrogatories.

Bulkley again : I saw testator shortly before his death, on the Sunday before, in his dining-room ; Defendant was present ; he was pressing my father to let him know the latest time at which the business with the college would be completed ; Defendant said about ten days at the latest ; testator said it would be the happiest day he had seen for many years ; when done he intended to settle his affairs.

Mrs. Penstone : Kept an hotel in Cork Street ; knew testator ; he has been at my house occasionally ; I saw him and the Defendant there about a fortnight before his death ; I understood he was going to the Lord Chief Justice ; he was then very ill ; Defendant wished him not to go, because he was too ill, and if he would allow it, he would go to Lord Chief Justice and put off the engagement ; testator seemed very angry, and said he would rather go on while he was able to do it ; they stayed about an hour and a half, till testator got the better of the spasms ; Mrs. W. was with them ; she also advised him to postpone it ; they left my house to go ; while he was getting into his carriage, I expressed my regret that he would not go home ; he said he was anxious to get the

business done, that he might settle his affairs; she said Defendant was always kind and anxious for the testator.*

John Lawrence Bicknell, who was examined as a witness on behalf of the Respondent to the 5th interrogatory, deposed, that at different times shortly after the decease of Richard Rich Wilford, he, deponent, had conversations with the Appellant in regard to Appellant's claim to the property of Richard Rich Wilford; and on the first of the said occasions the Appellant told the deponent that Richard Rich Wilford was dead; and that he, the Appellant, having shortly before his decease levied a fine of his estate at Chelsea, such fine was a revocation of the will of Richard Rich Wilford, and that he, the Appellant, would succeed to his real estate as heir-at-law, and thereupon deponent told the Appellant that, on the part of the hospital, he, deponent, should certainly require the executors of Richard Rich Wilford to call upon the heir-at-law to be a party to the conveyance of the land purchased by the hospital; but that as the agreement had been executed by Richard Rich Wilford, the purchase money would of course be personal property, to be received by the executors; and that (as deponent best recollects) the Appellant replied thereto, that he should wait until the executors communicated with him, or the Appellant expressed himself to such effect.

To the 6th interrogatory, the same witness deposed, that the Appellant did, as stated in deponent's deposition to the 5th interrogatory, inform the deponent that the aforesaid fine was a

* The foregoing evidence upon the trial of the issues is taken *verbatim* from a transcript of Lord Tenterden's notes.

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revocation of the will of the said Richard Rich Wilford, and deponent did not recollect that he, deponent, did then make any remark thereon, save as aforesaid, but that on one occasion when deponent was at the Green Man Inn on Blackheath, and just as he was entering a room there, in which a turnpike meeting was held, the Appellant came up to the deponent, and he, deponent, then remarked to the Appellant, that very great fault was found with him, the Appellant, for not having told the said Richard Rich Wilford that the fine he had levied was a revocation of his will; and in reply the Appellant said as follows; that is to say, "Why should I put a sword into the General's hands to cut my own throat?" And upon deponent saying the Appellant ought to have informed the said Richard Rich Wilford that the said fine was a revocation of his will, the Appellant replied, that he had no doubt that if the said Richard Rich Wilford had lived a short time longer, he would either have republished his will, or have made a new one.

The appeal case was argued in June, 1834, by Sir *Edward Sugden* and Mr. *F. Pollock* for the Appellant.

Sir *C. Wetherell* and Sir *W. Horne* for the Respondent.

The reasons given in support of the Appellant's case were as follows:—

The evidence for the Appellant (having regard also to his answers to the Respondent's bills) establishes that the Appellant did not know, believe, or suspect, during the life of the testator, that he was the testator's heir, or that the testator had made a will, or that the fine levied by the testator

would operate as a revocation of any previously existing will, and the issues ought not to have been directed, but the bill, either at the original hearing, or at the hearing of the appeal before the Lord Chancellor, ought to have been dismissed, so far as it prayed that the Appellant might be declared a trustee, and that he might be decreed to convey to the Respondent, and be restrained by injunction, the nature of the case being such as to make it more proper for the determination of a court of equity than of a jury.

Supposing the decrees or orders of the 23d day of February, 1826, and the 5th day of May, 1828, not to be erroneous, the order of the 15th day of July, 1829, whereby a new trial of the second issue was refused, ought to be reversed, and a new trial ordered, inasmuch as some of the evidence for the Respondent at the trial consisted of the testimony of witnesses not previously examined in the cause in the Court of Chancery, and which, therefore, came on the Appellant by surprise, and which he could not for such reason have been prepared to meet, and inasmuch as the questions intended by the Court of Chancery to be submitted to the jury were withdrawn from their consideration, they having been directed by the judge to presume that the Appellant knew what the legal effect of the fine would be on the testator's will, and inasmuch as the jury were in other respects misdirected on the trial.

No evidence on the part of the Respondent was adduced on the trial of the issues, to show that the Appellant omitted to inform the testator of the legal effect of the fine upon the will.

According to law, fraud cannot be presumed,

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but must be proved by direct and positive evidence; and there being no such evidence before the Court, no case was made out by the Respondent that ought to have been submitted to the jury, and the jury ought not to have found a verdict against the Appellant on the second issue on mere presumptive evidence.

Supposing that the Appellant, at the time of levying the fine, knew himself to be the heir presumptive of the testator, and that the testator had a will existing, and that the effect of the fine was to revoke such will (which knowledge, on the part of the Appellant, of such supposed facts was not proved by the Respondent, but, on the contrary, was, in part, disproved, and wholly denied by the Appellant's answers to the bills), the Court, by its judgment or decree of the 23d of February, 1826, declared that it was not necessary, to enable a solicitor to perform his duty as a solicitor, that he should be acquainted with every point of law, of the nature of that in question (referring to the legal effect of the fine upon a subsisting will); and that it was not a necessary part of the Appellant's duty to be acquainted with that law, and consequently not a necessary part of his duty to give the information to the testator as to the operation of such fine upon his will.

The Appellant, as the testator's solicitor, having seen that the fine was properly levied, and not having omitted the performance of any duty he owed to the testator as his client, the second issue was inconsistent, and at variance with such decree and declaration, and ought not to have been directed.

Supposing such new trial ought not to be ordered, the circumstances of the case are not such as en-

able a court of equity to decree the relief given by the decretal order of the 30th day of July, 1829.

Supposing the revocation of the testator's will even to have been occasioned by fraud on the part of the Appellant (which is not shown in evidence, either in the cause of the Court of Chancery or on the trial of the issues), the Court of Chancery has no jurisdiction or power to re-establish a will once revoked and made void by operation of law; or to divert real estates devised by any such will, out of that course, in which, in consequence of such revocation, the law of the land hath provided that such property shall go.

On the motion for a new trial on the 15th day of July, 1829, the Court refused to hear affidavits regularly made and filed by the Appellant in support of such motion; and the decree of the 30th day of July, 1829, which appears to have been founded on the verdict of the jury on the trial of the second issue, is contrary to all principle of equity, and to every rule of law.

For the Respondents, the case of *Seagrove v. Kirnan** was cited.

The Earl of Eldon.† — This is a case undoubtedly of very great importance, and I should be extremely sorry that the House should come to a judgment upon the subject, without its being fully and clearly understood upon what principle it proceeds. I think, and have often stated in the Court of Chancery, and I believe my practice was governed by what I so thought, that there was too much of a habit in that Court of sending matters to law which we ought to have decided, in the first instance, upon the evi-

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* Stated *post*, p. 144.

† Observations at the conclusion of the argument.

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dence before the Court. I know that this practice led to most enormous expenses, in many instances; and I hope that I did my utmost to save parties the expense of such proceedings. The decree in this case was made in the year 1823. Two issues were directed; and the first thing to be decided in this cause must be, whether it was the duty of the attorney, when this fine was proposed to be levied of a part of the estate, to inquire whether the testator had made a will or not; and one may venture to say, at least, that it is a matter of great importance to decide. The question to be decided one way or the other is, whether an attorney, although he knows, or should know, or can take advantage of his ignorance if he does not know (putting all fraud out of the question), shall himself profit by his ignorance; or, to put the question in a stronger way, if an attorney were not ignorant (and it is very difficult for me to suppose he could be ignorant), that a fine would revoke a will, supposing that he is not to be visited on the ground of positive fraud in respect of such conduct (and you ought always to decide, if you can, without prejudice to moral character); it is a matter of very great importance that it should be well settled, after this cause has been travelling through the courts in Westminster Hall for about eleven years, whether it is not absolutely necessary for us to decide what the Court ought to have done, in the first instance, when it had the bill and answer in equity before it, and all the evidence that was then upon record.

The case* in Ireland was decided, not upon the ground that there was any fraud on the part of the gentleman, whose conduct was found fault with, but

* *Seagrove v. Kirnan*, Rep.

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upon this principle, that a lawyer should not take the benefit of his ignorance; there was no pretence to say, in that case, that the law adviser of the man who made the will, knew the effect of making himself executor. It was a will of personal estate. There had been several legacies given by the testator, and the law adviser was made the executor. Your Lordships will understand what a material interest he acquired by that appointment, because it has been held, that if legacies are given in a will, but no legacy given to the executor, if you appoint him executor, that he will take all the clear undisposed of residue of the testator's personal estate. That was a case therefore which decided, not that the counsellor meant any fraud, that he was chargeable with any moral guilt, but that it was against the policy of the law, to permit a man, who ought to know the law which gives to the executor for his own benefit, the clear residue of the unbequeathed personal estate, to plead ignorance of the law, and that he should take for himself the benefit of that ignorance. That is, therefore, a most important case, and I am anxious to look into the particulars of it. I think also, that if the case upon the record itself furnishes principles of equity upon which the Court might decide the cause, however it might turn out upon an inquiry as to a particular fact, if it went to a jury, that parties should be delivered from the evils of suits as soon as possible.

This case has been argued at the bar upon a ground which must be the ground of the decree of 1823, which is now appealed from, that upon that occasion there ought either to have been a *quietus* to the Defendant, or a decree for the Plaintiff. I should be sorry if I ventured to give a final

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opinion upon this case, without having looked into the authorities that have been cited, and into all others that my own recollection may furnish me with a remembrance of. If the view which I take of this case be correct, it appears to me that the judgment might have been pronounced long since.

The circumstances of the case are these:—A gentleman, of the name of Richard Wilford, was seised, at the time of making his will, of lands and hereditaments at Chelsea; the lands then consisting of a mansion-house, called Ranelagh House, with the appurtenances, together with certain pieces of land adjoining, on one whereof there were five tenements, and on the other one tenement, the whole comprising about two acres; which premises, or the greater part of them, particularly the mansion house, had been devised to him by his father, and the residue had been purchased by the testator of divers persons. He was likewise entitled to another estate, near adjoining, called the Ranelagh estate, comprising about eighteen acres, with twelve messuages upon them. He made a will, dated the 28th of March, 1822, by which he devised all his real estate to his wife, who is the Respondent in this appeal, in fee; and by virtue of such will she was in possession thereof at his death. Before he died, and before making the will, he had entered into a contract with the commissioners and governors of Chelsea hospital, on behalf of himself, and the other proprietors of the Ranelagh estate, for the sale of part of that estate to them. It appears, that the title to the Ranelagh estate, as it is represented in these pleadings, was very complicated, having been held by trustees for

certain persons, who were shareholders in the property, to the number of thirty-six; and in consequence of that complication, doubts arose respecting the title to so much of that estate, and that therefore it formed part, or followed as a consequence, of the contract, that the testator should levy a fine of the lands, respecting which such doubt had arisen.

It appears, that the testator, upon many occasions before, had employed other solicitors than the Appellant. The Appellant, who is an attorney, was a relation of the testator. The necessity of levying a fine arose out of the persons who were concerned for the governors and commissioners of Chelsea hospital, thinking it would be desirable, as unquestionably it would be, to have a fine levied of these premises, in order that they, as the purchasers, might be sure of having a good title: it became, therefore, necessary, to levy such fine. The Appellant, being an attorney, was employed for the purpose of giving a satisfactory title to those who had bought this parcel of the testator's estate. The Appellant thought it was advisable that a fine should be levied, not only of that part of the estate which had been contracted for by the Chelsea Hospital Commissioners, not limiting the fine which was levied to those premises, where necessity called for the fine being levied, but he thought proper to levy a fine of the estates, in reference to which no contract had been entered into with the Commissioners of Chelsea Hospital, and which required no proceeding to clear the title to them. The result was, that the fine which was, as to part of the lands, necessary to complete the title to the purchasers, operated in law as a revocation of the

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devise to the widow of these premises, a parcel of which had been sold to the Chelsea Hospital Commissioners.

It turned out, that the gentleman, who had advised this large extent of the fine, the attorney, was himself the heir-at-law of the testator, though he states he had very great doubts about it, and did not believe that he was,—I wish to put it in the strongest way for him,—that he did not know, and did not believe, he was the heir-at-law of the testator, until he made that discovery, to say the least of it, shortly after the death of the testator; and that, therefore, this misfortune to the wife, in losing this property, was owing to his want of knowledge that the title of heir belonged to him: a relation he must have known himself to be. The testator had been very active in his exertions to serve this gentleman; and I do not mean to say that, if the testator had had an opportunity of considering and re-considering what would be the effect of this fine, I am far from being certain that he would not have left this property even to this gentleman himself. He states, not only that he did not know, or believe, or to that effect, that he was the heir-at-law of the testator, but also, that he did not know that the effect of the fine would be such as, in point of law, it has been; and, therefore, that his notion is, that he is entitled to have this property under the circumstances of this case. The bill alleges a fraudulent purpose.

I have taken great pains to look into this subject; and if I had heard the cause, in 1823, acting consistently with my habit, namely, if possible to save parties the expense of trials of issues, if the case afforded a clear ground of equity,—and in this

case I think such clear ground was afforded,—I should have thought it my duty, upon the principle which I am now about to state, at once to have said, whether you meant fraud, whether you knew that you were the heir-at-law of the testator or not, you, who have been wanting in what I conceive to be the duty of an attorney, if it happens that you get an advantage by that neglect, you shall not hold that advantage, but you shall be a trustee of the property, for the benefit of that person, who would have remained entitled to it, if you had known what you ought as an attorney to have known ; and being considered as knowing it, because you ought to have known it, you shall not take advantage of your own ignorance ; for so far I carry the principle, that a legal adviser shall not take advantage of his own ignorance. It is too dangerous to the interests of mankind, that those who are bound to advise, and who, being bound to advise, ought to be able to give sound and sufficient advice, should ever be allowed to take advantage of their own professional ignorance, to the prejudice of other persons.

This principle I find laid down by Lord Hardwicke, in different cases, and it is exceedingly well illustrated in a case decided in Ireland. I have in my possession, at this moment, the manuscript of the decree in the case, which was quoted at the bar : it is in the hand-writing of Sir Anthony Hart, the then Lord Chancellor of Ireland ; and this manuscript shows the diligence and accurate attention which he gave to the subject, having corrected and re-corrected it in order that the principle might be understood upon which the decree was made.

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That case was this :—A gentleman at the bar, who appeared, upon former transactions between the testator and himself, to have been a very intimate friend of the testator, made a will, appointing himself executor. According to the law at that time, if there were legacies given to other persons out of the personal estate, but no disposition of the residue, the executor, by his appointment, would have taken the whole of that residue. It was not the intention of that testator to give this learned counsellor any thing more than the office of executor; but he insisted that, having got the office of executor, he was entitled to the residue of the personal estate, and it turned out as a matter of fact; and the case was, in this respect, I believe, perfectly honest, that he was not aware of the doctrine at the time when he made the will which appointed him executor, that, under the dispositions and omissions of the will, he would be entitled to the residue. But what said the Court to that? The Court said, that is what you ought to have known, and you shall not take for your own benefit that which you have derived from your professional ignorance; and the consequence was, that he was declared to be, as I think this gentleman, the Appellant in this case, ought to be, a trustee for the next of kin of the residue of the personal estate, and a trustee of that part of the real estate with reference to which there was no occasion whatever, in order to carry the contract with the Commissioners of Chelsea Hospital into effect, to levy any fine.

This gentleman, I see, alleges that he did not know the testator had made a will; but he could not but know, considering the proposition I have

stated, that if the testator had made a will, devising all the other estates to his widow, and if he levied a fine extending to all his lands, it must revoke his will. I say it was his duty to have asked the testator whether he had made a will; and, in levying the fines, not to have gone beyond the necessity which arose in that case for the purpose of making the title to the commissioners complete, to carry that contract into effect, and it may be inferred, —(at least, we know nothing to the contrary, and it is but fair to say it, looking at the whole of his answer),—that if he had known that the estate had been devised to the lady who has become General Wilford's widow, he would not have levied a fine of that estate, except, indeed, under the effect and operation of a deed so framed, that it should give the same effect, as to her interest, as she would have taken under the will.

I have no hesitation in saying, that if I had heard this cause originally, I should not have directed any issues; because there is a principle of equity which considers, that if there is negligence in such cases, it is quite enough. Two issues, however, were directed; one of those issues was found for Mr. Bulkley, but the other was found against him, and that certainly does in the finding impute to him that he fraudulently omitted to inform his employer of the effect of the fine.

I should feel deep regret if I had ever been too quick in charging any man with fraud; but in the present case I must go the length of saying, that I cannot expound that declaration which was made to Mr. Bicknell by this gentleman, Mr. Bulkley,—I cannot expound that declaration without forming at least a conjecture, which my mind does not

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easily get rid of, that this gentleman had at least a conviction in his mind that it was better for him to take the chance of proving himself to be the heir-at-law after the death of this testator, than to take the chance of deriving a benefit from this property under the testator; and, attending to the argument of so able, acute, and learned a counsel as Sir Edward Sugden, finding nothing of fact to meet what is the natural effect of the declaration made at the casual meeting of Mr. Bicknell and Mr. Bulkley, having nothing but the reasoning which you heard from the bar upon the subject, I cannot but persuade myself that Sir Edward Sugden himself thought that the account he gave of it would have as little influence upon your Lordships' minds as it probably had upon his own. See what the words are: Mr. Bicknell says, "Have you inquired about a will?" What is the answer? "What! was I to put a sword," (mind you,) "into the General's hand," (these are the words,) "that he might cut my throat?" What was the meaning of that? Plainly interpreted, it is this, and this only, that I would not lose the chance I have if the fine was levied, by any thing being done to counteract the effect of that which I have done. And who was it that was to interfere, in order to counteract the effect of the fine? Why it was the General himself he alludes to:—"Would I put a sword into the General's hands, in order that he might cut my throat?" Is it possible to deny that there is ground for reasoning, upon that declaration, that there was at that moment, at least, in the mind of Mr. Bulkley, a notion that the effect of the fine would be disappointed by an act of the General himself?

The second issue was found by the jury against Mr. Bulkley, that he did fraudulently omit to tell the testator the effect of the fine. Now, I repeat again, that I am very sorry indeed to put this case, at least, entirely upon fraud; but my opinion is this, that the safety of mankind, with respect to their property, depends upon your Lordships' requiring from attornies that knowledge, at least, which every attorney ought to have. A professional man may not know that, if he levies a fine of the whole of a man's real estate, it will revoke his will as to that estate: there may be persons in the world who are so ignorant, but you cannot act upon their ignorance; and it is impossible to follow up these cases to their proper effect, as you do in the case of trustees, unless you hold attornies to this principle, that they shall give all the information which they ought to give, and unless you hold them also to this principle, that they shall not plead ignorance of that which they ought to know.

I, therefore, as I have before stated, should have made this decree in the first instance, without troubling myself with the question of fraud, by applying the principles which have always been applied to trustees, and to persons who are entrusted with the due management, in point of legal proceedings, of the property of others, and that they shall not take advantage of their own ignorance. If Mr. Bulkley was ignorant, much more if his conduct was fraudulent, (and I do not know how to set aside the finding of the jury,) I should have held upon the omission to inquire whether there was a will, notwithstanding the alleged ignorance that the will would be affected, as to the other property, to which the fine was not necessary to be applied,

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if it went beyond that property to which the levy of the fine ought to have been confined, that there is principle enough in the policy of the law, as administered in courts of equity, to say that he must be considered a trustee of that property of which the fine ought not to have been levied.

Under these circumstances, having been called upon by some of your Lordships to give my opinion upon this case, such is the opinion which I have formed. I think it impossible that this gentleman can hold this property, except as a trustee for the individual who was the devisee of the property under the will of the testator. I do not like to support, by much length of argument, that which I take to be a plain principle of equity; and, therefore, after stating the grounds upon which I have formed my opinion, it is for my noble and learned friend on the woolsack, who has been much more acquainted with the administration of justice than I have been, to inform your Lordships whether I have taken a wrong view of the subject, or whether I am correct in the opinion which I have formed.

Lord *Wynford*. — It is scarcely necessary to say a word after the speech that my noble and learned friend has addressed to your Lordships. I agree with every sentence he has uttered; and I hope that one of the observations which he has made will have its effect upon the members of the profession of the law; that they will all know, particularly with regard to that part of the profession to which the Appellant belongs, that, though there is no body of men more honourable in the discharge of those delicate duties which are cast upon them than the generality of them are, that there is an established rule in the Courts of Equity,

that no professional man can take advantage of his ignorance, or of his negligence, much less of his fraud. If there were not such a principle recognised by courts of equity, they would ill deserve that name.

There are two cases to which your Lordships' attention has been called at the bar, (one of which has been well and ably commented upon by my noble friend,) which recognise that principle: the one is in the elder Vesey, in which it is distinctly laid down as a principle, that no party can take advantage even of his ignorance, or of his negligence, and still less, undoubtedly, of his fraud. The principle is more clearly laid down in the case upon which my noble friend has commented, — the case which was decided by the late excellent and learned Lord Chancellor of Ireland.

Let us see whether the Appellant in this case is seeking to take advantage of his ignorance, or whether he is not attempting to avail himself of his fraud. He clearly knew that he was a relation of the testator, for that is admitted; and he believed more, (for that also he has admitted,) — that it was probable he was the heir presumptive of the deceased. Under these circumstances, he is called upon to levy a fine for a portion of the estate; and the jury upon that issue have found, very properly, that the fine was not levied by him to vacate the will, that it was levied for a different purpose. But, at the time when he levied the fine, he must have known (and I will prove that presently) that there was a will; and he certainly did know that the fine would revoke the will. But, whether he knew it or not, he ought to have known it; and every attorney must be presumed to know that a

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fine would revoke a will. I say this upon authority, — an authority that will ever remain unquestioned in Westminster Hall, — the authority of Lord Tenterden, who distinctly stated it in his direction to the jury in this case. I say it also upon the authority of Sir Anthony Hart, who distinctly stated, that a barrister, (and I know of no distinction between a barrister and an attorney in such a question, except that the latter is more frequently called upon to consider cases of this sort,) that a barrister was bound to know that the making a man an executor to a will, giving him no legacy, put into his control and power for his own use all the unbequeathed residue of the personal property of the testator. Upon the authority of both these learned persons, I say, if there is any difference in principle between the case of a professional man making himself executor, and thereby giving to himself the residue of the personal property, and this case of the solicitor being the heir, levying a fine, and revoking the will, by which the testator had disposed of his property, — this is a much stronger case; because a professional man must be very ignorant indeed not to know, that making a different disposition of the property revokes the disposition already made. Now, that being the case, is it possible — and I here quite agree with my noble and learned friend, that there was no occasion for any issue, but I shall say a word or two upon the facts presently — is it possible to say, upon what is stated in the bill and admitted in the answer, that your Lordships would not be allowing this gentleman to take advantage of his ignorance at least, or, as the jury have said, of his fraud, if, having levied a fine of all the lands,

without informing the testator of the effect that the fine would have upon the will, he is permitted by your judgment to take the benefit of his act and his ignorance?

I have stated that he knew he was a relation, and that he believed he was his presumptive heir: was it not his duty to have told his relation, if he knew of a will made, or to inquire if he did not know whether he had made a will, and to tell him that the effect of what he was doing would be to revoke and annul the will. It is not necessary to decide in this case (though I should have no difficulty in coming to a decision upon this point) whether or not, — supposing this gentleman to have known that he was the heir, and to have intended to take advantage of it, and that another devisee under the will had been injured by it, — whether an action would not have lain against him for negligence; but there is a great difference between recovering compensation for negligence, and allowing a man upon his own oath to take advantage of it. This is not a case to recover compensation for a wrong done, but what your Lordships are called upon to say is, whether you will allow this gentleman to take advantage of the wrong he has done, either through ignorance or fraud. I say, therefore, upon the facts as they appear upon the bill and answer, that I agree with my noble friend, though I am not so conversant with equity as he is; but for the reasons which he has given, I should have said that this cause was at an end in the Court of Chancery, and that there was no need for an issue. This gentleman has acknowledged that he levied this fine, and that he did not tell the testator what the effect of the fine would be in regard

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to his will, and it would render all property in this country insecure, considering the confidence reposed in attorneys, if in such cases you were to allow an attorney to take advantage of his own misconduct.

The learned Judge in the Court below, thought proper to direct an issue, and I am not sorry that he did; except that the parties have been put, in my opinion, to an unnecessary expense. But we decide this case more satisfactorily, from the facts elicited from the different witnesses, by being examined before a jury, and we have the advantage of the opinion of Lord Tenterden upon the law of the case, as far as regards the obligation upon an attorney to bring a competent knowledge to the discharge of his duty; and he does not bring a competent knowledge to the discharge of his duty, unless he knows the effect of a fine to operate the revocation of a will.

There were two issues:—first, whether this gentleman did fraudulently levy a fine with a view to his own interest? The jury have properly found that he did not, because there is not the least evidence that the fine was levied with that intent. The fine was required by the respectable gentleman whose name has been mentioned in the course of this cause, Mr. Bicknell, without any reference to the interests of the party who levied the fine, or that of his family, but to secure the interests of that public body, for whom Mr. Bicknell was about to become the purchaser. The jury have found that the fine was not fraudulently levied. But there is another issue, whether, supposing the fine not improperly levied, this gentleman did not fraudulently conceal from the General that the

fine would have the effect of revoking the will. They have found the fraud, and I think they have done rightly. I think they could have come to no other conclusion upon the facts in this case. In the first place, there is the testimony of the young woman of the name of Wilcox, who speaks of the Appellant coming to the house whilst the General was lying dead, and telling her and her mother that the General had omitted to give them any legacy in his will, as he had promised, but that the will was void; that he should be in possession as heir-at-law, and that he would make up to them for the negligence of the General, and, in fact, provide for the whole family.

Strong observations have been made by Sir Edward Sugden, as to the improbability of that evidence. I do not go along with him. The only ground that makes it improbable is, that the mother does not hear what was said, or recollect any such circumstance occurring. We do not know the age of this woman, or whether she is liable to the infirmity of deafness; she might not be able to speak to it, either from age or deafness: if from age, she might have forgotten it; or if from deafness, she might not have heard what the daughter did hear. But I cannot say that I think this an improbable story. A person in the situation of this Appellant would be very likely to reconcile himself, as well as he could, with the different servants in the family: there were many ways in which they might do him great injury, and many ways in which they might render him service. It was not at all improbable, in my opinion, that a man who had concealed this important fact, so operating upon the interests of the family, should attempt to obtain the favour of

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the servants in supporting and carrying into effect that which he had done. I think, therefore, it is far from being improbable, from the experience which I have gained in courts of justice. I have known many instances of persons who have improperly interfered in making and revoking wills, and who have made use of the artifices imputed to this person to support the schemes which they have undertaken.

But is not this testimony of the woman supported by the testimony of Mr. Bicknell? Nay, you do not want the testimony of this woman, Mr. Bicknell proves the whole case. Mr. Bicknell proves that in the lifetime of the General the Appellant must have known there was a will, and must have known that the fine would have the effect of revoking that will: I say, Mr. Bicknell proves that, because what is the conversation? He is told that the world finds fault with him for not telling the General the effect of the fine upon his will. Supposing his present case to be true, his answer would have been, I know nothing of it; and if there was a will, I did not know that the fine would revoke it. Is that his answer? No; the answer proves his knowledge of the will, and that he had that knowledge while the General was alive; for, he says, "Why should I put a sword in the General's hand to cut my throat?" That means, If I had told the General that the fine would have revoked the will, he would have made another will. I say that this witness most distinctly proves, that this gentleman did know of the existence of this will, and did know the effect of the fine with regard to this will.

How is this met? It is met by the testimony of

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the witnesses, who say that, the General being ill upon the morning he was to attend Lord Chief Justice Dallas to levy this fine, the Appellant persuaded him not to go. It is not necessary that you should come to a conclusion that this man is a brute, or that he had not those feelings that a rational man ought to have, in order to decide this question. If he saw the General so ill as it is represented he was, it was natural that he should have said (and he must have been a monster if he had not said), Do not go this morning, you will have other opportunities; you do not know what the consequence may be. Is that a circumstance to be weighed against this evidence, taking it in the best point of view for the Appellant? But there is another point of view in which that may be taken: he might have thought that the taking before Lord Chief Justice Dallas a person in that state, when he came into the presence of the judge, the matter might have been explained, and his projects have been disappointed.

It is true that a gentleman of the name of Wilmot was examined in the Court of Chancery. That gentleman was not called before the jury where he could have been cross-examined. I do not mean to say any thing disrespectful of him; I knew something of him formerly; but it is probable that Mr. Wilmot, who had been examined in Chancery, might have told the jury in what manner it was that the Appellant expressed his ignorance of the effect of this fine: but Mr. Wilmot is not called. It is said he was not called, because Sir James Scarlett was of opinion that his evidence ought not to be received. I agree with Sir James Scarlett; but, agreeing with Sir James Scarlett, I would have

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tendered that witness, and have seen whether he was objected to, as he was not objected to in the Court of Chancery; and as the rules of evidence are the same in Chancery as in Common Law, I do not think he would have been rejected in a court of law: but he ought to have tendered that evidence. But with the evidence to which I have adverted, the jury could come to no other conclusion than that which is found by their verdict, which is not, that this concealment was through ignorance, but that it was through fraud. This gentleman has spoken of his character: that which I have said falls very short of that which has been said by twelve respectable men upon their oaths. I confess if Mr. Bicknell's evidence be true, (and no doubt it is true,) I think the jury have come to a right conclusion, and that we cannot speak of this transaction in any other terms than those which are recorded in the verdict of the jury.

This is an important case to the parties themselves, but it is of infinitely greater importance to the public; and if your Lordships should be disposed to adopt the recommendation of my noble friend, you will give security to property, and it will tend to inform every one that, if an attorney should, with a view to his own particular interest, be induced to advise, and do acts injurious to the property of his employer, he shall not be permitted to derive advantage from it. I, therefore, concurring with my noble friend, move your Lordships, that this appeal be dismissed with costs not exceeding 200*l.*, that does not mean 200*l.* actually to be paid by the Appellant, unless it is proved to the officer, whose duty it will be to ascertain the actual amount of the costs, that the costs which the

Respondent has been put to by this appeal actually amount to that sum. [*Some conversation here took place between Lord Eldon and Lord Wynford.*] From the circumstances which are stated to me, I find that there will be no occasion for any taxation of costs. I move your Lordships to give 50*l*. costs, and then the judgment will take effect immediately.

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Judgment below affirmed, with 50*l*. costs.

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(COURT OF KING'S BENCH.)

THOMAS BOURKE RICK- } *Plaintiff in Error ;*
ETTS - - - - }

ROBERT LEWIS, WILLIAM }
ELEMENT, and WILLIAM } *Defendants in Error.*
PREECE - - - - }

The statute 8 & 9 W. 3., c. 11., § 2., provides that "if any person shall commence or prosecute, in any Court of Record, any action, plaint, or suit, wherein, upon demurrer, either by Plaintiff or Defendant, judgment shall be given by the Court against such Plaintiff, or if at any time after judgment given for the Defendant in any such action, the Plaintiff shall sue out any writ of error, and judgment shall be affirmed, &c., the Defendant shall have his costs, &c." This enactment is not confined to writs of error after judgments upon demurrer, but extends to all cases of writs of error after judgment for the Defendant.*

THIS was an action of trespass commenced in the Court of Common Pleas. To part of the trespasses charged in the declaration, certain special pleas were pleaded (without any general issue), which pleas did not justify the whole of the trespasses charged in the declaration; and issues being joined on the special pleas, and judgment by default having been signed against the De-

* This decision overrules *Golding v. Dias*, 10 East, 4. See *Ferguson v. Rawlinson*, 2 Strange, 1084; *Andrews*, 114.

defendants for the trespasses not covered by those special pleas, the cause came on for trial, on a *tam quam venire*, at the Herefordshire Summer assizes in the year 1827, on which occasion a verdict passed for the Plaintiff for one shilling damages, for the trespasses not covered by the special pleas; and for the Defendants, who are also Defendants in error, on all the issues joined on those pleas. A motion was made in the Court of Common Pleas, and a rule granted to show cause why this verdict should not be set aside; but this was, in Easter term, 1828, after argument discharged.

The Plaintiff then brought a writ of error in the Court of King's Bench; and on its coming on for argument, that Court also gave judgment for the Defendants. The Defendants then entered up judgment of affirmance, and also judgment for their costs of the writ of error; whereupon the Plaintiff moved, that the taxation of the costs should be set aside, on the authority of the case of *Golding v. Dias*, 10 East, p. 4; but on the argument*, the Court overruled that case, and decided that the Defendants were entitled to their costs.

The Plaintiff then brought a writ of error in the Exchequer Chamber, before the Barons of the Exchequer and the Judges of the Court of Common Pleas, which was set down for argument; and on its being called on, it was ordered to be struck out of the paper, the Lord Chief Justice Tindal stating, that it was not within the meaning of 1 W. 4. c. 70. s. 8.; inasmuch as, if it were so, the Judges of the Court of Common Pleas, with the addition of only one Baron of the Exchequer,

* 1 Barn. & Adol., p. 197.

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might be called upon to overrule a judgment formerly given by them.

The writ of error in the House of Lords was against these judgments.

For the Plaintiff in error, the arguments in the printed case were as follows :

The Plaintiff has judgment for part of the trespasses complained of, therefore no judgment should have been given against him ; for he having succeeded upon part of his case, ought not to be in mercy ; and the Defendants were not entitled to any judgment, the Plaintiff having judgment for part of the trespasses not covered by the justifications.*

The Plaintiff is therefore entitled to have the judgment so given in favour of the Defendants, and the giving of costs to them of 189*l.* 10*s.*, reversed, and the costs in error also, because the Court below ought to have reversed that judgment.

The Plaintiff is also entitled to have judgment in his favour, and also judgment for 99*l.* 19*s.* additional damages for the trespasses attempted to be justified ; for by justifying without pleading the general issue, or denying, or taking, the damages by protestation, the damages are admitted.

All arguments and discussions about the prescriptions and the merits of the pleas will be useless, for the Defendants can legally have no judgment, because such judgment must show repugnancy and incongruity. Every plea alleges, " They, " the said Defendants, doing no unnecessary damage to the said Plaintiff, on those or any or either

* *Knight, Esq. v. Lillo*, 2 Wilson, p. 81.

"of the said occasions herein-before in this plea "mentioned;" and yet the Plaintiff has judgment for damages confessed by the several pleas to have been unnecessarily done upon those very occasions; the judgment for the Plaintiff falsifies their pleas, and destroys the ground upon which their claim for a judgment rests; for the undefended trespasses are admitted to have been then and there done, with the other trespasses.

But if the Plaintiff's right to a judgment were to depend upon the Defendants' justifications, he is most justly entitled to it, for all the pleas are bad and insufficient bars; bad in form and substance, and unfit to be allowed by any court of justice to establish rights of way which are to bind the Plaintiff's property for ever; and the Plaintiff would have demurred to them in the first instance, if he could have confessed what is stated in the prescriptions.

First. — Because all the prescriptions are illegal; for it is not shown that Lyndon Evelyn claimed the way by reason of the seisin of Brandhill, nor is it alleged, according to the usual and necessary mode of pleading, in a plea of justification, that the way was belonging to that close. A way in gross, therefore, was prescribed for, which is not only contrary to the common law (see Littleton's Tenures Villenage, sec. 183, and what Mr. Justice Bayley says in *Hewlins v. Shippan*, in 5 Barnewall and Creswell's Reports, p. 227.), but also contrary to the Statute of Frauds; for if it were held to be good, Lyndon Evelyn, by the purchase of Brandhill alone, might and would acquire an incorporeal hereditament without any writing at all.

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Secondly. — There is no prescription in any plea upon the record which justifies the trespasses admitted, in their very first attempted justification in going over the lower part of the Plaintiff's close, and then over a certain other part into Brandhill, for the purpose of cutting down and falling trees there, and after having cut down and fallen those trees returning over the Plaintiff's close, without fetching, drawing, removing, or carrying away the trees or any part of them. "It is incumbent on " him who enters on the land of another to show " that he has a right so to do." (Per Lord Chief Justice Abbott in the *Earl of Lonsdale v. Nelson and others*, 2 Barnewall and Creswell's King's Bench Reports, p. 302.) The same may be said of the first attempted justification in the third plea, and which plea attempts to justify the bringing of wag-gons with horses drawing the same, and also poles, into the Plaintiff's close without prescribing for any right to do so.

Thirdly. — The attempted justification in the second plea actually shows, that the Defendants were guilty of trespasses which they do not justify; they prescribe for a way along a certain part of the Plaintiff's close, into Brandhill, to cut down and fall trees there, and to draw, remove, and carry the trees fallen, along certain traces, &c. in a certain other part of the said close; therefore the way to go, to cut down, and fall, was different from that to remove the trees. In their justification they say, that in going through, to cut down and fall the trees, they went along the *said* other part of the said close which was the removal way, and they drew the poles along a certain part of the said close of the Plaintiff.

Fourthly. — Every plea admits some trespasses committed, which are not justified by the prescription pleaded.

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As the record stands, the Plaintiff is entitled to his costs of the action, under the statute of Gloucester, having judgment for damages; because the stat. of the 22d & 23d Charles 2. does not apply here, for there was no Judge who could certify, and that Act only applies to trespasses denied. (See *Sheldon v. Ludgate*, Buller's *Nisi Prius*, p. 329.)

In respect to the costs in error, even if the Plaintiff had no judgment upon the record, and the pleas were good, the judgment of the Court of King's Bench would be erroneous, because the stat. of 8 & 9 William 3, c. 11., only gives costs in error after demurrer (even if it does that, for the preamble of the second section only speaks of costs of suit), for the following reasons: —

First. — It is to be presumed, that the legislature never intended to pass so unjust an act as to give such costs after verdict.

Secondly. — It is a penal statute, and must be construed strictly.

Thirdly. — It would put Defendants in error who were Defendants in the cause, in a better situation than Defendants in error who were Plaintiffs in the cause; for the statutes which give costs to Plaintiffs, only gives such costs where there is a delay of execution; but this statute makes no such distinction.

Fourthly. — The act only applies to frivolous and vexatious suits, and no suit can be frivolous and vexatious in which a justification is pleaded;

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and here are some of the longest special pleas in justification that ever were put upon record.

Lastly. — The Court of King's Bench in the cause of *Golding v. Dias*, 10 East's Reports, p. 2., determined that the act only applied to writs of error upon judgment given on demurrer, and said, "That taking the whole context of the clause together, it was evident that it only related to judgments given on demurrer, for Defendants below, to whom remedy was intended to be given for their costs, both below and above, on affirmation of such judgment, which they had not before," and, therefore, the Court refused the rule for costs in error. And though the same Court, in *Ricketts v. Lewis*, 1 Barn. and Adol. Reports, p. 197., overruled that solemn decision, as the Lord Chief Justice called it, because that case did not appear to have been very fully discussed, yet they relied upon another case, in which this point about the costs in error was not discussed at all, the Lord Chief Justice saying, "No authorities were cited upon this question, except that of *Golding v. Dias* ; but in a case, 2 Strange, 1084, *Fergusson v. Rawlinson* (reported also in Andrews, p. 114., from which report it may be collected, that the case arose after verdict), it appears to have been the opinion of Lord Chief Justice Lee, that this statute applies to all cases of writs of error after judgment for the Defendant."

It is a rule in law, that when a Defendant in a cause brings a writ of error, the Court can only affirm or reverse the judgment ; but that when a Plaintiff brings one, if the Court reverses the judgment, it must also do him that justice which the

Court below ought to have done, and give such judgment in his favour as the record will warrant, otherwise there would be a failure of justice. (See Roll's Abridgment, p. 744.; *Greene v. Cole*, 2 Saunders, 256.; *Cuming v. Sibley*, Burrows' Reports, p. 2490.; *Wyvell v. Stapleton*, 1 Strange, 616.)

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For the Defendant in error the reasons were: *First*: because, as to the objection, founded on the supposed insufficiency of the pleas, it will appear on reference thereto, that the whole of the trespasses admitted in the several pleas to have been committed, are justified by the pleas which respectively purport to be an answer to such trespasses: and, even if such were not the case, the objection is mere matter of informality, which ought to have been raised by special demurrer, and will not avail the Plaintiff after verdict and judgment entered thereon.

Secondly: in regard to the costs awarded to the Defendants, on the judgment of affirmation on the writ of error, it is clear, from the general context of the stat. 8 and 9 W. 3. c. 11., on which the right to such costs is founded, that this is a case within that statute, in support of which argument see the opinion of Lord Tenterden in this very case of *Ricketts v. Lewis*, 1 B. and Adol. Rep., 199 and 200.

Thirdly: in regard to the objection founded on the omission of the Court of Common Pleas, to award to the Plaintiff the general costs of the cause, it is clear, that although by the statute of Gloucester, where a Plaintiff recovers damages, he is entitled also to the general costs of the action, yet that right is restricted by the subsequent statute of

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22 and 23 Car. 2. c. 9., whereby it is enacted that,
 “ In all actions of trespass, &c. wherein the judge,
 “ at the trial of the cause, shall not find and certify
 “ under his hand, upon the back of the record,
 “ that the freehold or title of the land mentioned
 “ in the Plaintiff’s declaration was chiefly in ques-
 “ tion, the Plaintiff, in case the Jury shall find the
 “ damages to be under the value of forty shillings,
 “ shall not recover, or obtain more costs of suit
 “ than the damages so found shall amount unto.”

And in this case the judge did not give any such certificate. And in regard to the award to the Defendants of the costs of the trial, and of the issues found for them on the special pleas, it is clear that, inasmuch as these costs were incurred altogether by the act of the Plaintiff, in taking the cause down to trial on those issues, in a case where he was entitled only to damages for the trespasses admitted (which damages might have been assessed on a writ of inquiry), the Defendants are legally and justly entitled to the costs of a proceeding originating altogether in the resistance of the Plaintiff to a right, which a jury, by their verdict, have decided to be just and well-founded.

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When the appeal was called on to be heard, no Counsel appearing for the Plaintiff in Error, the judgment was Affirmed.

Judgment affirmed.

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(COURT OF CHANCERY.)

JULIA LANGSTON, an Infant, by the
 HON. HENRY GEORGE FRANCIS
 MORETON, her next Friend;
 MARIA SARAH LANGSTON, CHAS.
 BARTER, the elder, and ELIZA-
 BETH CATHERINE, his Wife, and
 CHARLES BARTER, the younger,
 an Infant, by the said CHARLES
 BARTER, the elder, his next
 Friend - - - - }

Appellants;

JAMES HAUGHTON LANGSTON, Sir
 CHARLES MORICE POLE, Bart.,
 and HAUGHTON FARMER OKE-
 OVER - - - - }

Respondents.

Upon a will, devising lands in trust to be conveyed and settled to the use of L., the devisor's eldest son, for his life, remainder to his *second*, third, fourth, fifth, and *all and every other* the son and sons of the body of L., lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the heirs male of their bodies respectively: Held upon the words and context of the will, making provisions inconsistent with the intention that a first son of L. should be excluded—that such first son took an estate in the lands in tail male.

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JOHN LANGSTON, being seised in fee of considerable estates in Middlesex and Oxfordshire, and being also seised to him and his heirs of several copyhold estates in the same counties, made and published his last will and testament, in writing, bearing date the 28th day of July, 1801, which was executed and attested in the manner by law required to pass freehold estates by devise: and he thereby gave and devised all his freehold and copyhold manors, messuages, farms, lands, tenements, tithes, and hereditaments, situate and being in the several counties of Oxford and Middlesex, or elsewhere in England (except his shares in the New River Company), unto John Pollexfen Bastard, Esq., John Williams Hope, Esq., and Charles Morice Pole, Esq. (now Sir Charles Morice Pole, Bart., one of the above-named Respondents), their heirs and assigns, upon the trusts and for the purposes therein and partly herein-after mentioned (that is to say): upon trust during the minority of the said testator's son, the above-named Respondent James Haughton Langston, to receive the rents and profits thereof, and to dispose of the same for the purposes in the said will mentioned; and upon this further trust, that when the Respondent, James Haughton Langston, should attain the age of twenty-one years, the said trustees, or the survivors or survivor of them, or the heirs or assigns of such survivor, should by good and sufficient conveyances and assurances in the law, convey, settle, and assure the same manors, messuages, farms, lands, tenements, tithes, and hereditaments therein-before to them devised, so and in such manner as that the same should and might remain,

continue, and be, to, for, and upon the several uses, trusts, and purposes, and by, with, under, and subject to, the several powers, provisoes, declarations, limitations and agreements therein and partly herein-after mentioned, expressed, and declared, of and concerning the same, or such and so many of them as should be then subsisting or capable of taking effect (that is to say): to the use of the said testator's son, the Respondent, James Haughton Langston, for and during the term of his natural life, without impeachment of waste, and from and after the determination of that estate by forfeiture or otherwise in his lifetime; to the use of trustees to be named in such settlement and their heirs, during the life of him, the Respondent, James Haughton Langston; in trust, by the usual ways and means, to preserve the contingent uses and estates to be therein-after limited with remainder; to the use of the *second third, fourth, fifth, and all and every* OTHER the son and sons of the body of him, the said Respondent, James Haughton Langston, lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, to be always preferred, and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing with remainder: To the use of the said testator's second and other sons successively in tail male with remainder: To the use of other trustees to be named in the said settlement, their executors, ad-

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ministrators and assigns, for the term of 500 years upon the trusts, and for the intents and purposes therein-after mentioned, with remainder for the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said Respondent, James Haughton Langston, lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth; and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters, and the heirs of her body, to be always preferred and to take before the younger of such daughter and daughters, and the heirs of her and their body and bodies issuing; and for default of such issue, to the use of other trustees to be named in the said settlement, their executors, administrators and assigns, for the term of ninety-nine years, upon the trusts and for the intents and purposes in the said will mentioned with remainder: To the use of the said testator's eldest daughter, the Appellant, Maria Sarah Langston, and her assigns, for and during the term of her natural life without impeachment of waste, and from and after the determination of that estate by forfeiture in her lifetime: To the use of the same trustees to be in the said settlement named for preserving contingent remainders, and their heirs, during the life of her the said testator's said daughter: In trust, by the usual ways and means, to preserve the contingent uses and estates to be therein-after limited with remainder: To the use of the first, second, third, fourth, fifth, and all and every other the

son and sons of the body of her the said testator's said daughter lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be, in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; and for default of such issue, to the use of other trustees to be named in the said settlement, their executors, administrators, and assigns, for the term of 600 years: Upon the trusts, and for the intents and purposes in the said will mentioned, with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of her the said testator's said daughter, the Appellant, Maria Sarah Langston, lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters and the heirs of her body to be always preferred, and to take before the younger of such daughter and daughters, and the heirs of her and their body and bodies issuing; and for default of such issue, to the use of his the said testator's daughter, Elizabeth Catherine Langston (then Elizabeth Catherine Barter, one of the above-named Appellants), and her assigns, for and during the term of her natural life without impeachment of waste, and from and after the determination of that estate by forfeiture or otherwise in her lifetime: To the use of the same trustees, to be in the said settlement named, for

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preserving contingent remainders and their heirs, during the life of her, the Appellant, Elizabeth Catherine Barter. In trust, by the usual ways and means, to preserve the contingent uses and estates to be therein-after limited with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the body of her, the said Appellant, Elizabeth Catherine Barter lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, to be always preferred, and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing; and for default of such issue, to the use of other trustees to be named in the said settlement, their executors, administrators and assigns, for the term of 700 years, upon the trusts and for the intents and purposes in the said will mentioned, with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of her the said Appellant, Elizabeth Catherine Barter, lawfully begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters and the heirs of her body to be always preferred, and to take before the younger of such daughter and

son and sons of the body of her the said testator's said daughter lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be, in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing; and for default of such issue, to the use of other trustees to be named in the said settlement, their executors, administrators, and assigns, for the term of 600 years: Upon the trusts, and for the intents and purposes in the said will mentioned, with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of her the said testator's said daughter, the Appellant, Maria Sarah Langston, lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters and the heirs of her body to be always preferred, and to take before the youngest of such daughter and daughters, and the heirs of her and their body and bodies issuing; and for default of such issue, to the use of his the said testator's daughter, Elizabeth Catherine Langston (then Elizabeth Catherine Barter, one of the above-named Appellants), and her assigns, for and during the term of her natural life without impeachment of waste, and from and after the determination of that estate by forfeiture or otherwise in her lifetime: To the use of the same trustees, to be in the said settlement named, for

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preserving contingent remainders and their heirs, during the life of her, the Appellant, Elizabeth Catherine Barter. In trust, by the usual ways and means, to preserve the contingent uses and estates to be therein-after limited with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the body of her, the said Appellant, Elizabeth Catherine Barter lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, to be always preferred, and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing; and for default of such issue, to the use of other trustees to be named in the said settlement, their executors, administrators and assigns, for the term of 700 years, upon the trusts and for the intents and purposes in the said will mentioned, with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of her the said Appellant, Elizabeth Catherine Barter, lawfully begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters and the heirs of her body to be always preferred, and to take before the younger of such daughter and

be always preferred, and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing; and for default of such issue, to the use of other trustees to be named in the said settlement, their executors, administrators and assigns, for the term of 900 years, upon the trusts, and for the intents and purposes in the said will mentioned, with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of her, the said testator's said daughter, Agatha Maria Sophia (Kekewich), lawfully begotten, severally, successively and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters, and the heirs of her body, to be always preferred, and to take before the younger of such daughter and daughters, and the heirs of her and their body and bodies issuing; and for default of such issue, to the use of the said testator's daughter, Henrietta Maria Langston, and her assigns, for and during the term of her natural life without impeachment of waste, and from and immediately after the determination of that estate by forfeiture or otherwise in her lifetime: To the use of the same trustees to be in the said settlement named, for preserving contingent remainders and their heirs, during the life of her, the said testator's said daughter, Henrietta Maria Langston: In trust, by the usual ways and means, to preserve the contingent uses and estates to be therein-after limited, with remainder to the first, second, third, fourth,

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the body of the said Caroline (Dame Graham), lawfully begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters and the heirs of her body to be always preferred, and to take before the younger of such daughter and daughters, and the heirs of her and their body and bodies issuing; and for default of such issue, to the use of his the said testator's daughter, Agatha Maria Sophia Langston (the wife of Samuel Trehawke Kekewich,) and her assigns, for and during the term of her natural life without impeachment of waste, and from and after the determination of that estate by forfeiture or otherwise: To the use of the same trustees to be in the said settlement named, for preserving contingent remainders and their heirs, during the life of her, the said testator's said daughter, Agatha Maria Sophia (Kekewich): In trust, by the usual ways and means, to preserve the contingent uses and estates to be therein-after limited with remainder: To the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the body of her the said testator's said daughter, Agatha Maria Sophia (Kekewich), lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, to

be always preferred; and to take before the younger of such son and sons, and the heirs male of his and their body and bodies issuing; and for default of such issue, to the use of other trustees to be named in the said settlement, their executors, administrators and assigns, for the term of 900 years, upon the trusts, and for the intents and purposes in the said will mentioned, with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of her, the said testator's said daughter, Agatha Maria Sophia (Kekewich), lawfully begotten, severally, successively and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters, and the heirs of her body, to be always preferred, and to take before the younger of such daughter and daughters, and the heirs of her and their body and bodies issuing; and for default of such issue, to the use of the said testator's daughter, Henrieta Maria Langston, and her assigns, for and during the term of her natural life without impeachment of waste, and from and immediately after the determination of that estate by forfeiture or otherwise in her lifetime: To the use of the same trustees to be in the said settlement named, for preserving contingent remainders and their heirs, during the life of her, the said testator's said daughter, Henrietta Maria Langston: In trust, by the usual ways and means, to preserve the contingent uses and estates to be therein-after limited, with remainder to the first, second, third, fourth,

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fifth, and all and every other the son and sons of the body of her, the said testator's said daughter, Henrietta Maria Langston, lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body to be always preferred, and to take before the younger of such son and sons, and the heirs male of his and their body and bodies lawfully issuing, with remainder: To the use of other trustees to be named in the said settlement, their executors, administrators, and assigns, for the term of 1000 years, upon the trusts, and for the intents and purposes in the said will mentioned, with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of her, the said testator's said daughter, Henrietta Maria Langston, lawfully begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters, and the heirs of her body, to be always preferred, and to take before the younger of such daughter and daughters, and the heirs of her and their body and bodies issuing, with remainder to the said testator's sixth and other daughter thereafter to be born successively in tail general with remainder: To the use of other trustees to be named in the said settlement, their executors, ad-

ministrators and assigns, for the term of 1500 years, upon the trusts, and to and for the intents and purposes therein-after mentioned with remainder: To the use of the said testator's sister, Sarah, the wife of Peter Cazalet, her heirs and assigns for ever.

And the said testator by his said will declared, that as, for, and concerning the said term of 500 years by his said will directed to be limited to trustees as aforesaid, the same term should be limited unto them, their executors, administrators, and assigns upon trust, that in case there should be no son of the body of his said son, the said Respondent, James Haughton Langston, nor any future son of his the said testator's own body, or there being any such son or sons, if he and they should all die without issue male, before any of them should attain the age of twenty-one years, and there should be two or more daughters of the body of the Respondent, James Haughton Langston, then they the same trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, should, after the decease of the said Respondent, James Haughton Langston, and such failure of issue male of the said James Haughton Langston's body, and of the said testator's own body as aforesaid, by mortgage or sale, or other disposition, of all or any part of the premises comprised in the said term of 500 years, or by the rents and profits thereof, or by any other ways or means whatsoever, levy and raise such sum and sums of money, for the portion and portions of all and every such daughter and daughters, *other than and besides an eldest* or only daughter as in the said will mentioned (that is to say): in case there should be but one such

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daughter, not being an eldest or only daughter, the full sum of 20,000*l.* for the portion of such one daughter, to be paid to such one daughter at her age of twenty-one years, or day of marriage, which should first happen, after the commencement of the said term of 500 years in possession; but if such only daughter should have attained such age, or be married before such commencement, then to be paid to her immediately after such commencement; and if there should be two or more such younger daughters, then the sum of 40,000*l.* for the portions of such two or more of them, and to be paid and divided unto or between and among them, or any one or more of them, and to be payable at such days and times, and in such parts, shares, and proportions, and subject to such provisoes, conditions, and limitations over (such limitations over to be for the benefit of some or one of them), as the Respondent, James Haughton Langston, at any time or times during his life, by any writing or writings, with or without power of revocation and new appointment, sealed and delivered by him in the presence of, and attested by, two or more credible witnesses, or by his last will and testament in writing, or any codicil thereto, signed in the presence of, and attested by, three or more credible witnesses, should direct or appoint, and for want of such direction or appointment, to be paid to such two or more younger daughters, and to be shared and divided between and among them all, in equal parts, shares, and proportions, share and share alike, and to be paid to her and them at her or their age or ages of twenty-one years, or at the day or days of her or their respective marriages, which should first happen, after

the commencement of the said term of 500 years in possession; and as to such of them as might have attained such age, or be married before such commencement, to be paid immediately after such commencement. But if any such younger daughter or daughters should attain her or their age or ages of twenty-one years, or should be married before the commencement of the said term of 500 years in possession, then, and in such case, all and every the said several portion and portions of such daughter and daughters so attaining the age of twenty-one years, or marrying, as aforesaid, if the said term should afterwards commence and take effect in possession, but not otherwise, should be considered as vested interests respectively; but nevertheless, the payment of the same portion or portions should be postponed until the end of twelve calendar months next after the decease of the said Respondent, James Haughton Langston, and failure of issue male of his body, and of the said testator's body as aforesaid, and then the portion or portions should be payable, with interest for the same, after the rate of 4*l.* by the year for each sum of 100*l.*, from the time of the commencement of the said term of 500 years in possession: provided always, that if any such younger daughter should depart this life, or become an eldest daughter, and as such become entitled in possession to the said manors and other hereditaments therein-before devised before she should attain the age of twenty-one years, or be married, or before such other time or times as should or might be appointed for the payment of her or their portion or portions as aforesaid, the portion or sum of money provided for each such

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daughter or daughters so dying or becoming an eldest daughter, should, from time to time, go and accrue to the survivors or survivor, and others or other of the said younger daughters, and should be equally divided between such survivors, or others of them, if more than one, share and share alike, and the same should be payable at such respective days and times, and should go in the same manner to such surviving and other daughter and daughters as by the said will provided and declared, touching their original portion and portions; and in case of the death of any other or others of the said daughters, or if any other or others of them should become an eldest daughter, and entitled as aforesaid, before she or they should have attained such ages or times as aforesaid, then all and every such accruing or surviving share and shares should, from time to time, again be subject and liable to such further right, chance, contingency, or condition of accruer or survivorship, to the survivors and survivor, and others and other of the said younger daughters, as in the said will declared, touching her or their original portion or portions: provided nevertheless, that if the said younger daughter should be reduced to one, there should not be raised for the portion of such one younger daughter by reason of any such survivorship, any sum or sums that would in the whole exceed the principal sum of 20,000*l*. And upon this further trust, that they the same trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, should, after the decease of the Respondent, James Haughton Langston, and such failure of issue male of his body, and the said testator's body as aforesaid,

levy and raise, by all or any of the ways and means aforesaid, for the maintenance and education of all and every such younger daughter and daughters in the mean time, and until her and their respective portions should become payable, such yearly sum and sums of money as would be equivalent to the interest of the respective portions intended to be provided for such younger daughter and daughters as aforesaid, at the rate of 4*l.* by the year for each sum of 100*l.*, such yearly sum for maintenance to be paid quarterly, at the four most usual feasts or days of payment of rent in the year by equal portions, and the first payment thereof to be made on such of the said feasts as should first happen after the decease of the Respondent, James Haughton Langston, and such failure of issue male of his body, and of the said testator's body as aforesaid : provided always, that no such sale or mortgage should be made until some or one of the said portions or part thereof should become payable as aforesaid, and that after the said maintenances should be raised and paid, the residue and overplus of the rents and profits, if any, should, until some one or more of the said portions should become payable, be had and received by the person and persons respectively, who, for the time being, should be next entitled to the reversion or remainder of the said premises, immediately expectant on the determination of the said term of 500 years, to and for her and their own use and benefit : provided always, that in case there should be no such daughter or daughters of the body of the said James Haughton Langston, other than and besides an only daughter, or there being such younger daughter or daughters, in case all of them

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should happen to die before any of them should attain the age of twenty-one years, or be married, or before such other time as might be appointed for payment of her or their portion or portions, or if all and every such younger daughter and daughters should become an eldest daughter before any of them should have attained such age or time as aforesaid, or in case all and every the trusts thereby directed to be declared, of and concerning the said term of 500 years, should in all things be fully performed and satisfied, or should be discharged, either by becoming incapable of being performed, or by any other means, and the said trustees and each of them, and their and each of their executors, administrators, and assigns, should be fully reimbursed and satisfied, all charges and expenses occasioned by or relating to the trusts so to be in them reposed, or if the person or persons to whom the next estate of freehold or inheritance of and in the premises to be comprised in the said term of 500 years in reversion or remainder, expectant on the determination of the said term, should, for the time being, belong, should pay, or cause to be paid, unto them the said trustees or the survivor of them, his executors or administrators, or well and sufficiently secure to be paid out of real estate, or by transfer of *3l. per cent.* consolidated annuities, the portion or portions therein-before provided for such younger daughter or daughters, or so much thereof as should be remaining unpaid (all such maintenance, interest, charge, and expenses as in the said will mentioned being first paid and satisfied). Then and in any of the said cases the said term of 500 years of and in the said premises therein comprised, or so much

thereof as should then remain unsold and undisposed of for the purposes aforesaid, should cease, determine and be void.

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And as to the term of ninety-nine years, in the will directed to be limited to trustees, the testator thereby directed that the same term should be limited unto them, their executors, administrators and assigns upon trust, that in case there should be no son or daughter of the body of the said Respondent, James Haughton Langston, nor any future son of his the said testator's body; or there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain his, her, or their age or ages of twenty-one years; then they the same trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should after the decease of the said James Haughton Langston, and such failure of issue as aforesaid, by mortgage or sale, or other disposition, of all or any part of the hereditaments to be comprised in the said term of ninety-nine years, or by the rents and profits thereof, or by any other ways and means, levy and raise for the use and benefit of such of the said testator's youngest daughters, Elizabeth Catherine (Barter), Caroline (Dame Graham), Agatha Maria Sophia (Kekewich), and Henrietta Maria Langston respectively, or such of them as should not from time to time be in the actual possession of or entitled to the said hereditaments, under or by virtue of the limitations to be contained in the said settlement so directed to be made as aforesaid, for and during their respective

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natural lives, an annuity or yearly sum of 500*l.* clear of all taxes and deductions whatsoever, and should pay the same unto them his said youngest daughters respectively or their respective assigns, by equal half-yearly payments on the 25th day of March and the 29th day of September in every year, and should make the first payment thereof on such of the said days as should next happen after the commencement of the said term of ninety-nine years in possession : provided further, that in case there should be no son or daughter of the body of the said Appellant, Maria Sarah Langston, or there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain the age of twenty-one years, and if the said Caroline (Dame Graham), Agatha Maria Sophia (Kekewich), and Henrietta Maria Langston, or any of them, should be then living ; then upon trust that they the same trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, should after the several deceases of the Respondent, James Haughton Langston, and the said Appellant, Maria Sarah Langston, and failure of all such issue as aforesaid, by the ways and means aforesaid, levy and raise for the use and benefit of each of them, his the said testator's three youngest daughters, Caroline (Dame Graham), Agatha Maria Sophia (Kekewich), and Henrietta Maria Langston respectively, or such of them as should not, from time to time, be in the actual possession of or entitled to the said manors and other hereditaments, under and by virtue of the

limitations to be contained in the said settlement so to be made as aforesaid, for and during the term of their respective natural lives, a yearly sum of 300*l.*, clear of all taxes and deductions whatsoever, over and above the said annuity or clear yearly sum of 500*l.* in the said will provided for each of them, his said youngest daughters, and should pay the same unto them the said testator's three youngest daughters respectively, or their respective assigns, by equal half-yearly payments, on such days and times, and together with the said annuities or clear yearly sums of 500*l.*, therein-before provided for each such youngest daughter, and in manner therein-before directed, touching the said respective annuities of 500*l.*: provided further, that in case any of them, his said youngest daughters for whom annuities were in the said will provided, should become entitled in possession to his said manors and other hereditaments therein-before devised, by virtue of the limitations to be contained in the said settlement so to be made as aforesaid, then, and in such case, and from thenceforth, the said annuities or clear yearly sums, in the said will directed to be provided for such daughter or daughters respectively, so becoming entitled as aforesaid, should cease, determine, and be no longer paid or payable.

And as to, for, and concerning the said term of 600 years by the said will directed to be limited to trustees, the said testator thereby directed that the same term should be limited unto them, their executors, administrators, and assigns, upon trust, that in case there should be no son or daughter of the body of the Respondent, James Haughton Langston, nor any future son of the said testator's

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own body, or there being such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain the age of twenty-one years, and also in case there should be no son of the body of his the said testator's daughter, the Appellant, Maria Sarah Langston, or there being any such son or sons, if he and they should all die without issue male, before any of them should attain the age of twenty-one years, and there should be two or more daughters of the body of his the said testator's said daughter Maria Sarah Langston; then upon trust that they the same trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, should, after the several deceases of the Respondent, James Haughton Langston, and the said Appellant, Maria Sarah Langston, and such failure of issue as last aforesaid, by mortgage, or sale, or other disposition of all or any part of the hereditaments to be comprised in the said term of 600 years, or by the rents and profits thereof, or by any other ways or means, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters of the said Appellant, Maria Sarah Langston (*other than and besides an eldest or only daughter*), as in the said will mentioned (that is to say); in case there should be but one such daughter, *not being an eldest or only daughter*, the full sum of 20,000*l.* for the portion of such one daughter; to be paid to such one daughter at her age of twenty-one years or day of marriage, which should first happen after the commencement of the said term of 600

years in possession; but if such only daughter should have attained such age, or been married before the commencement of the same term in possession, then to be paid to her immediately after such commencement; and if there should be two or more such youngest daughters, then the sum of 40,000*l.* for the portions of such two or more of them, and to be paid and divided to, or between, and among them, or some, or one of them, and to be payable at such days and times, and in such parts, shares, and proportions, and subject to such provisoes, conditions, and limitations over (such limitations over to be for the benefit of some or one of them), as she, the said Appellant, Maria Sarah Langston, at any time, or times, during her life, should direct or appoint; and for want of such direction or appointment, to be paid to such two or more younger daughters, and to be shared and divided between them all, in equal shares, and to be paid to her and them, at her or their age or ages of twenty-one years, or at the day or days of her or their respective marriages, which should first happen after the commencement of the said term of 600 years in possession; and as to such of them as might have attained such age, or been married, before such commencement of the same term, to be paid immediately after such commencement thereof.

And as to, for, and concerning the said term of 700 years by the said will directed to be limited to trustees, the said testator, by his said will, directed that the same term should be limited unto them, their executors, administrators, and assigns, upon trust, that in case there should be no son or daughter of the body or respective bodies of the said Re-

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spondent, James Haughton Langston, or of the said Appellant, Maria Sarah Langston, nor any future son of the said testator's body, or there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain the age of twenty-one years, and also in case there should be no son of the body of the said Appellant, Elizabeth Catherine (Barter), or there being any such son or sons, if he and they should all die, without issue male, before any of them should attain the age of twenty-one years, and there should be two or more daughters of the body of the said Appellant, Elizabeth Catherine (now Barter); then upon trust, that they the same trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, should, after the several deceases of the said James Haughton Langston, and the said Maria Sarah Langston, and Elizabeth Catherine (Barter), and such failure of issue as last aforesaid, by mortgage, or sale, or other disposition of all or any part of the hereditaments to be comprised in the said term of 700 years, or by the rents and profits thereof, or by any other ways or means, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters of the said Appellant, Elizabeth Catherine (Barter), *other than and besides an eldest* or only daughter, as in the said will mentioned (that is to say): in case there should be but one such daughter, *not being an eldest* or only daughter, the sum of 20,000*l.* for the portion of such one daughter, to be paid to such one

daughter at her age of twenty-one years, or day of marriage, after the commencement of the said term of 700 years; but if such only daughter should have attained such age, or been married before the commencement of the same term in possession, then to be paid to her immediately after the commencement of the same term in possession; and if there should be two or more such youngest daughters, then the sum of 40,000*l.* for the portions of such two or more of them, to be paid to her and them at her or their age or ages of twenty-one years, or at the day or days of her or their respective marriages, after the commencement of the said term of 700 years in possession; and as to such of them as might have attained such age, or been married before the commencement of the same term in possession, to be paid immediately after such commencement thereof.

And as to the said term of 800 years, by the said will directed to be limited to trustees, the said testator thereby directed that the same term should be limited to them, their executors, administrators, and assigns, upon trust, in case there should be no son or daughter of the body or respective bodies of the said Respondent, James Haughton Langston, or of the said Appellants, Maria Sarah Langston and Elizabeth Catherine (Barter), or any of them, nor any future son of the said testator's body, or there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain the age of twenty-one years, and also in case there should be no son of the body of the said

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Caroline (Dame Graham), or being any such son or sons, if he and they should all die without issue male before any of them should attain the age of twenty-one years, and there should be two or more daughters of the body of the said Caroline (Dame Graham); then upon trust that they the same trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should, after the several deceases of the said James Haughton Langston and the said Maria Sarah Langston, Elizabeth Catherine (Barter), and Caroline (Dame Graham), and such failure of issue as last aforesaid, by mortgage, or sale, or other disposition of all or any part of the premises, to be comprised in the said term of 800 years, or by the rents and profits thereof, or by any other ways or means, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters of the said Caroline (Dame Graham), *other than and besides an eldest* or only daughter, as therein-after mentioned (that is to say); in case there should be but one such daughter, *not being an eldest* or only daughter, the sum of 20,000*l.* for the portion of such one daughter, at her age of twenty-one years or day of marriage, after the commencement of the said term of 800 years in possession; but if such only daughter should have attained such age, or been married before the commencement of the said term in possession, then to be paid to her immediately after such commencement of the said term; and if there should be two or more such youngest daughters, then the sum of 40,000*l.* for the portions of such two or more of them, to be paid to her and them, at her or their

age or ages of twenty-one years, or at the day or days of her or their respective marriages, which should first happen after the commencement of the said term of 800 years in possession; and as to such of them as might have attained such age, or been married, before the commencement of the same term in possession, to be paid immediately after such commencement thereof.

And as to the said term of 900 years, by the said will directed to be limited to trustees, the said testator thereby directed that the same term should be so limited unto them, their executors, administrators, and assigns, upon trust, that in case there should be no son or daughter of the body or respective bodies of the said Respondent, James Haughton Langston, or of the said Appellants, Maria Sarah Langston and Elizabeth Catherine (Barter), and the said Caroline (Dame Graham), or of any of them, nor any future son of his the said testator's body, or there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain the age of twenty-one years, and also in case there should be no son of the body of the said Agatha Maria Sophia (Kekewich), or there being any such son or sons, if he and they should all die without issue male, before any of them should attain the age of twenty-one years, and there should be two or more daughters of the body of the said Agatha Maria Sophia (Kekewich); then, upon trust, that they the same trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor

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should, after the several deceases of the said James Haughton Langston and the said Maria Sarah Langston, Elizabeth Catherine (Barter), Caroline (Dame Graham), and Agatha Maria Sophia (Kekewich), and such failure of issue as last aforesaid, by mortgage, or sale, or other disposition of all or any part of the premises, to be comprised in the said term of 900 years, or by the rents and profits thereof, or by any other ways or means, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters of the said Agatha Maria Sophia (Kekewich), *other than and besides an eldest* or only daughter, as in the said will mentioned (that is to say), in case there should be but one such daughter, *not being an eldest* or only daughter, the sum of 20,000*l.*, and if there should be two or more such youngest daughters, then the sum of 40,000*l.* for the portions of such two or more of them, and to be paid to her and them, at her or their age or ages of twenty-one years, or at the day or days of her or their respective marriages, which should first happen after the commencement of the said term of 900 years in possession; and as to such of them as might have attained such age, or been married, before the commencement of the same term in possession, to be paid immediately after such commencement thereof.

And as to the said term of 1000 years, by his said will directed to be limited to trustees, the said testator thereby directed that the same term should be so limited unto them, their executors, administrators, and assigns, upon trust, that in case there should be no son or daughter of the body or respective bodies of the said James Haughton

Langston, or of the said Maria Sarah Langston, Elizabeth Catherine (Barter), Caroline (Dame Graham), and Agatha Maria Sophia (Kekewich), or any of them; nor any future son of his the said testator's body, or there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain the age of twenty-one years, and also in case there should be no son of the body of the said Henrietta Maria Langston, or, there being any such son or sons, if he and they should all die, without issue male, before any of them should attain the age of twenty-one years, and there should be two or more daughters of the body of the said Henrietta Maria Langston; then that they, the same trustees, and the survivor of them, and the executors, administrators, and assigns of such survivor, should, after the several deceases of the said James Haughton Langston and the said Maria Sarah Langston, Elizabeth Catherine (Barter), Caroline (Dame Graham), Agatha Maria Sophia (Kekewich), and Henrietta Maria Langston, and such failure of issue as last aforesaid, by mortgage, or sale, or other disposition of all or any part of the hereditaments, to be comprised in the said term of 1000 years, or by the rents and profits thereof, or by any other ways or means, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters of the said Henrietta Maria Langston (*other than and besides an eldest or only daughter*), as in the said will mentioned (that is to say); in case there should be but one such

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daughter, *not being an eldest* or only daughter, the sum of 20,000*l.* for the portion of such one daughter, and if there should be two or more such younger daughters, then the sum of 40,000*l.* for the portions of such two or more of them, to be paid to her and them at her or their age or ages of twenty-one years, or at the day or days of her or their respective marriages, which should first happen after the commencement of the said term of 1000 years in possession; and as to such of them as might have attained such age, or been married, before the commencement of the said term in possession, to be paid immediately after such commencement thereof.

And the testator by his will directed, that provisoes should be inserted in the settlement, giving unto and amongst the younger daughters of his said then present daughters respectively, a like benefit of survivorship and accruer, in respect of the portions by the said will directed to be provided for the younger daughters of each of them respectively, under the trusts of the said several terms of 600 years, 700 years, 800 years, 900 years, and 1000 years respectively, in case any such younger daughters should depart this life, or *become an eldest daughter* and entitled as aforesaid, before she should attain her age of twenty-one years, or be married; or before such other time or times as should be appointed for payment of her or their portion or portions as aforesaid, so as nevertheless, that if the younger daughters of any of them, his said daughters above named, should be reduced to one, there should not be raised for her portion, by reason of such survivorship, any sum or sums exceeding in the whole the sum

of 20,000*l.*, and also for authorising and empowering the respective trustees to raise maintenance for such younger daughters respectively, until their respective portions should become payable, and providing for the determination of the said terms of 600 years, 700 years, 800 years, 900 years, and 1000 years respectively, to the like effect and in such and the like manner as in the said will directed, with respect to the said term of 500 years, and the portions of the younger daughters of the Respondent, James Haughton Langston, directed to be raised under the trusts thereof.

And as to the term of 1500 years, by the said will directed to be limited to trustees, the said testator thereby directed that the same term should be so limited unto them, their executors, administrators, and assigns, upon trust, that in case there should be no son or daughter of the body or respective bodies of the Respondent, James Haughton Langston, or of the said testator's then present daughters, or of any of them, nor any future son or daughter of the said testator's body, or there being any such son or sons, daughter or daughters, if all and every such son or sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain his, her, or their age, or ages, of twenty-one years, then that they the same trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, should, within the space of twelve calendar months after the several deceases of the Respondent, James Haughton Langston, and the said testator's then present daughters, and failure of all such issue as

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last aforesaid, by mortgage, or sale, or other disposition of all or any part of the said premises, to be comprised in the said term of 1500 years, or by the rents and profits thereof, or by any other ways or means whatsoever, levy and raise the sum of 80,000*l.* of lawful money of Great Britain, together with interest for the same, from the commencement of the said term of 1500 years in possession, after the rate of 4*l.* by the year for each sum of 100*l.*, and should pay, apply, and dispose of the same in manner in the said will mentioned (that is to say); one moiety thereof unto his sister Mary Ann, the wife of George Arnold Arnold, esq., her executors, administrators, and assigns, and the other moiety thereof unto his nephew, the Respondent, Haughton Farmer Okeover, his executors, administrators, and assigns: and in the said will is contained a power or proviso enabling the Respondent, James Haughton Langston, by any deed or deeds, or by his last will and testament in writing, or any codicil thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses, to grant, limit, or appoint any rent, or annual sum, not exceeding, in the whole, the clear yearly sum of 1000*l.*, to be issuing and payable out of all or any of the manors, messuages, farms, lands, tenements, tithes, and hereditaments therein-before devised, unto any woman or women he should marry or take to wife, for and during the life or lives of such woman or women respectively, for or in the nature of her or their jointure or jointures, and in bar or without being in bar of dower; such rent, or annual sum, to take effect from the death of the Respondent, James Haughton Langston, and to be payable half-yearly, or quar-

terly, on or at such days, or times, as the said James Haughton Langston should think fit.

And the testator thereby also provided and directed, that it should be lawful for the Respondent, James Haughton Langston, from time to time, during his natural life, in case there should be any child or children of his body, lawfully begotten, *other than and besides an eldest or only son*, by any deed or deeds, instrument or instruments in writing, to be by him, the said James Haughton Langston, sealed and delivered in the presence of and attested by two or more credible witnesses, with or without power of revocation, or by his last will and testament in writing, to be by him signed, sealed, and published, in the presence of and attested by three or more credible witnesses, to charge all or any part of the said manors, messuages, farms, lands, tenements, tithes and hereditaments, by the said will devised, with and for the raising and payment of any principal sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.*, for the portion or portions of any one, two, or more of the younger son or sons, daughter or daughters, of the body of him the said James Haughton Langston, lawfully to be begotten, born in his lifetime, or in due time after his decease, to be paid and payable unto and to vest in such younger son or sons, or daughter or daughters respectively, at such time or times, and in such shares and proportions, with such clauses of survivorship, and in such manner as the said James Haughton Langston should, by such deed or deeds, instrument or instruments, in writing, or last will and testament, to be executed and attested as aforesaid, direct, limit, and appoint; and also charge the same premises with or for the payment

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of any sum or sums of money, yearly or otherwise, as the said James Haughton Langston should think fit, for the maintenance of such younger son or sons, daughter or daughters, from the time of his death until such portion or portions respectively should become payable, not exceeding the interest of such portions after the rate of *4l. per cent.* per annum. And the more effectually to secure and enforce the raising and due payment of such principal sum or sums of money, not exceeding in the whole the said sum of *25,000l.*, as the said James Haughton Langston should think fit and be entitled to charge as aforesaid, the said testator willed and declared that it should be lawful for the said James Haughton Langston, by the same or any such like deed or deeds, instrument or instruments, in writing, to be sealed and delivered as aforesaid, or by such his last will and testament, to be signed, sealed, and published, as aforesaid, to limit and appoint, by way of demise or mortgage, the hereditaments he should so charge to any person or persons for any term or number of years, without impeachment of waste, for the purpose of raising and securing such portion or portions and maintenance, so as the term and estate to be appointed by way of any such demise or mortgage should be made redeemable, on full payment of the portion or portions and maintenance which should be so charged by virtue of the said power, by the person or persons who, for the time being, should be entitled to the next estate in remainder, either at law or in equity, of and in the premises so to be limited and appointed by way of demise or mortgage as aforesaid.

And the testator by his will further directed, that

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in like manner it should be lawful for each of his said daughters, to whom estates for life in his said devised estates were therein-before limited, when and as they should respectively be in the actual possession of his said devised estates, in case there should be any child or children of their respective bodies lawfully begotten, *other than and besides an eldest or only son*, by any such or the like deed or deeds, instrument or instruments, in writing, to be executed and attested as aforesaid, or by their respective last wills and testaments, or any writing or writings of appointment in the nature thereof, to be signed, sealed, and published as aforesaid, to charge all or any part of the said devised estates with and for the raising and payment of any sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.*, for the portion or portions of any one, two, or more of their respective younger children, with the like power of providing maintenance and limiting a term of years for raising the said portion or portions and maintenance, and in such and the like manner, to all intents and purposes, as in the said will directed, with respect to the portion or portions of the younger son and sons, and daughter and daughters of the Respondent, James Haughton Langston. And the said testator by his said will gave all the residue of his personal estate unto the Respondent, James Haughton Langston, if and when he should attain the age of twenty-one years; but if he should die under that age, leaving a child or children, then to such child, of if more than one, to such children equally. But if the said James Haughton Langston should die under the age of twenty-one years, and there should be no son or daughter of his body living at the

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time of his death, then to the testator's said daughters equally.

John Pollexfen Bastard, John Williams Hope, and Sir Charles Morice Pole (the trustees), were appointed executors of the will.

The testator made and published a codicil to his said will, bearing date the 21st day of June, 1808, and executed and attested in such manner as by law is required for rendering valid devises of real estates; and thereby appointed his nephew, the Respondent, Haughton Farmer Okeover, a trustee and executor of his said will, in addition to the trustees and executors thereby appointed. And the testator, by the said codicil, devised and bequeathed to the said Haughton Farmer Okeover, his heirs, executors, and administrators, the same estates upon the same trusts, with the same powers, and for the same ends, intents, and purposes, as such estates were devised and bequeathed to the trustees and executors nominated and appointed in and by the will.

The testator also made and published a certain other codicil to his will, bearing date the 6th day of March, 1811, and executed and attested in such manner as by law is required for rendering valid devises of real estates; and thereby revoked so much of his said will as nominated and appointed the said John Williams Hope a trustee or executor of his real or personal estates.

The testator also made a certain other codicil to his will, bearing date the 21st day of December, 1811, but not attested by any witness, whereby he gave and bequeathed certain annuities and legacies therein specified; and he thereby appointed Charles Dixon, therein described, an executor of

his said will, jointly with the other executors thereof; and in other respects confirmed his will.

The testator died on the 11th of February, 1812, without having (save as aforesaid) revoked or altered his said will and codicils, or any of them, leaving the Respondent, James Haughton Langston, his only son and heir-at-law.

John Pollexfen Bastard, Sir Charles Morice Pole, Haughton Farmer Okeover, and Charles Dixon, duly proved the will and codicils; and as executors and devisees in trust undertook the execution of the trusts which devolved on them.

John Pollexfen Bastard died in the year 1816. The testator's daughters, the Appellants, Maria Sarah Langston and Elizabeth Catherine (Barter), together with his other daughters, Caroline (Dame Graham), Agatha Maria Sophia (Kekewich), and Henrietta Maria Langston, named in his will, all survived the testator, and attained their respective ages of twenty-one years; and the testator left no other daughter surviving, or born after his decease.

The Appellant, Elizabeth Catherine (Barter), in the year 1817, intermarried with the Appellant, the Rev. Charles Barter, clerk; and the Appellant, Charles Barter, the younger, an infant of the age of nine years, was the eldest son of the marriage.

Caroline (Dame Graham), in the year 1819, intermarried with Sandford Graham, esq. (afterwards Sir Sandford Graham, baronet), Agatha Maria Sophia (Kekewich), in the year 1820, intermarried with Samuel Trehawke Kekewich, esq.; and the Appellants, the said Maria Sarah Langston, and the said Henrietta Maria Langston, were unmarried.

The Respondent, James Haughton Langston, on

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the 24th day of May, 1817, attained his age of twenty-one years, and on the 21st day of June, 1824, filed his original bill of complaint, in the High Court of Chancery in England, against Sir Charles Morice Pole, bart., Haughton Farmer Okeover, Maria Sarah Langston, Charles Barter the elder, and Elizabeth Catherine his wife, and Charles Barter the younger, as Defendants.

The bill, after referring to the testator's will and codicils, and otherwise stating to the effect herein-before stated, prayed that the will and codicils might be established, and the trusts thereof, so far as respects the settlement and conveyance of the manors, messuages, lands, tenements, hereditaments, and real estate of the said testator, so devised to the Respondents, Sir Charles Morice Pole, and Haughton Farmer Okeover, and their said late deceased co-trustee, as aforesaid, might be carried into execution by a settlement and conveyance to be made by the Respondents, Sir Charles Morice Pole, and Haughton Farmer Okeover, of the same manors, messuages, lands, tenements, hereditaments, and real estate, to the uses, upon the trusts, and for the intents and purposes, and with, under, and subject to the powers, provisoes, and declarations, to, upon, for, with, under, and subject to which, the same were by the said will directed to be settled and conveyed, or as near thereto as the deaths of persons, or the circumstances of the case, would permit; and especially that in making such settlement and conveyance, a limitation might be inserted therein, whereby the said manors, messuages, lands, tenements, hereditaments, and real estate might be limited, settled, and assured to the use of the Respondent, James

Haughton Langston's first son, in tail male, in remainder, immediately after the limitation, to the use of trustees during the life of the Respondent, James Haughton Langston, to preserve contingent remainders, and immediately before the limitation to the use of the Respondent, James Haughton Langston's second son, in tail male, and for general relief.

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The cause came on to be heard on the 22d day of February, 1826, before Lord Gifford, the then Master of the Rolls, who ordered that a case should be made for the opinion of a Court of Law. In settling the form of the case, it was assumed that the Respondent, James Haughton Langston, had a first son born of the name of Henry Langston, and accordingly a case directed by an order of the 23rd of February, 1826, for the opinion of his Majesty's justices of the Court of King's Bench, and the question was to be, "Whether Henry Langston, the first son of the testator's son, James Haughton Langston, takes any estate under the testator's will?" and all proper facts necessary to bring the matters into question were to be stated in the case; and it was ordered that it should be referred to the master in rotation to settle the case, if the parties differed about the same; and the consideration of all further directions, and of the costs of the suit, were reserved until after the judges should have made their certificate; and any of the parties were to be at liberty to apply to the Court, as there should be occasion.

In pursuance of the order, a case was made for the opinion of the Court of King's Bench, containing a statement of the limitations of the will, to the effect herein-before set forth, in the form of legal

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limitations, and a general but much shorter statement than is herein-before made of other parts of the will, and stating that the testator died in February, 1812, leaving the Respondent, James Haughton Langston, his only son and heir-at-law (then a minor), and several daughters, him surviving, having previously made three codicils to his will, the last of which bears date in February, 1812, but none of them making the least variation in or in any manner affecting the above-mentioned limitation of his real estates; and further stating, that the Respondent, James Haughton Langston, attained the age of twenty-one years in May, 1817, and had since that time intermarried; and stating, as facts, that James Haughton Langston had issue by his wife two sons, viz. Henry Langston, his eldest or first-born son, and Edward Langston, his second-born son. The question which upon this case was proposed to the judges was, "Whether "the said Henry Langston, the first son of the "said testator's son, the said James Haughton "Langston, takes any estate under the said will?"

The Judges of the Court of King's Bench, by their certificate bearing date the 30th of April, 1827, certified that the case had been argued before them, and that they having considered the same, were of opinion that Henry Langston, the first son of the testator's son, the said James Haughton Langston, did not take any estate under the will.

On the 13th day of March, 1828, and also on the 17th day of the same month, the cause came on to be heard for further directions; and as to the matter of costs reserved by the order before the Master of the Rolls, who made an order,

which states that the pleadings in the cause being again opened thereupon, and upon debate of the matter, and hearing the order, dated the 23d day of February, 1826, the judge's certificate, dated the 30th of April, 1827, read, his Honour ordered that a case should be made for the opinion of his Majesty's judges of the Court of Common Pleas. In settling this case, it was also, for the purpose of raising the question in dispute—assumed, that the Respondent, James Haughton Langston, had a first son born of the name of Henry Langston, and accordingly it was by the last-mentioned order directed that the question should be, “Whether Henry Langston, the first “son of the testator's son, James Haughton “Langston, takes any and what estate under the “said testator's will?” And his Honour gave other usual directions in the same terms as in the said order of the 23d day of February, 1826, and reserved further directions and costs, with liberty for any of the parties to apply.

In pursuance of the order of the 17th of March, 1828, a case was made, stating the same parts of the will as those which are herein-before set forth, except only that the limitations are stated in the shape of legal limitations, and the will was therefore stated in greater detail and more fully than had been stated in the case sent for the opinion of the Court of King's Bench, and the question upon the case submitted to the judges of the Court of Common Pleas was, “Whether Henry “Langston, the first son of testator's son, James “Haughton Langston, takes any and what estate “under the said will?”

The judges of his Majesty's Court of Common

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Pleas were attended with the case, and by their certificate bearing date the 28th day of November, 1828, certified that the case having been argued before them, and they having considered the same, were of opinion that Henry Langston, the first son of the testator's son, James Haughton Langston, takes an estate in tail male under the said will, expectant on the decease of the said James Haughton Langston.

On the 28th day of July, 1829, the said cause came on to be heard before his Honour the Master of the Rolls for further directions upon the last-mentioned certificate, when upon debate of the matter and hearing the will of the said testator, and the order dated the 23d of February, 1826, the certificate of the Court of King's Bench, the order dated the 17th of March, 1828, and the said certificate of the Court of Common Pleas read, his Honour ordered that the certificate of the judges of his Majesty's Court of Common Pleas should be confirmed, and declared that the first son of the Respondent, James Haughton Langston, would take an estate in tail male under the said will, expectant on the decease of his father, the Respondent, James Haughton Langston: And his Honour declared that the testator's said will ought to be established, and the trusts thereof performed and carried into execution by the Respondents, Sir Charles Morice Pole and Haughton Farmer Okeover, his surviving trustees therein named, so far as related to the settlement and conveyance of the manors, messuages, lands, tenements, hereditaments, and real estates of the said testator, and of the accumulations arising from the rents and profits thereof, during the minority of the

Respondent, James Haughton Langston, and which are by the will of the said testator directed to be laid out and invested in the purchase of manors, messuages, farms, lands, tenements, and hereditaments: And it was ordered, that the Respondents, Sir Charles Maurice Pole and Haughton Farmer Okeover, the surviving trustees of the said will, should convey and assure the said manors, messuages, lands, tenements, hereditaments, and accumulations therein mentioned or referred to, to the uses, upon the trusts, and for the intents and purposes therein mentioned, or such of them as were then subsisting or capable of taking any effect; but so as to limit the same to the use of the first son of the Respondent, James Haughton Langston, in tail male in remainder, immediately after the limitation to the use of trustees during the life of the Respondent, James Haughton Langston, such conveyance to be settled by the Master in rotation, in case the parties differed about the same.

The Respondent, James Haughton Langston, in the month of July, 1824, intermarried with the Honourable Julia Frances Moreton; and after the last-mentioned decree, and before any further proceedings in the cause, the Appellant, Julia Langston, was born of the said marriage, and she was the only child of the Respondent, James Haughton Langston, and, under the limitation by the will directed to be made, in default of issue male, to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the Respondent, James Haughton Langston, in tail, became the first tenant in tail in *esse* of the

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manors, lands, and hereditaments, by the said will so devised and directed to be settled as aforesaid.

On the 17th day of February, 1830, the Respondent, James Haughton Langston, filed his bill of complaint in the Court of Chancery, against all the Defendants in the first-mentioned suit, and also against the Appellant, Julia Langston, and thereby, after stating to the effect herein-before stated, prayed that the said bill might be taken to be a supplemental bill to the said former suit, and that the Respondent, James Haughton Langston, might be declared to be entitled to the benefit of, and to be at liberty to carry on and prosecute the said decree, orders, and other proceedings, in the said original cause against the Appellant, Julia Langston, and the other Defendants thereto, and to have the same benefit thereof as if the said Appellant, Julia Langston, had been born, and had been the first tenant in tail in *esse* when the said original bill was filed, and the said other proceedings were had as aforesaid, or otherwise, that it might be decreed and declared in the said supplemental, or second suit, as an original suit, that the first son of the Respondent, James Haughton Langston, would take an estate in tail male, under the said will expectant on the decease of the Respondent, James Haughton Langston, and that in that suit the testator's will and codicils might be established, and the trusts thereof performed and carried into execution by the surviving trustees, so far as relates to the settlement and conveyance of the manors, messuages, lands, tenements, hereditaments, and real estates of the said testator, and of the accumulations in the said will mentioned,

during the minority of the Respondent, James Haughton Langston, and which were thereby directed to be laid out and invested in the purchase of manors, messuages, farms, lands, tenements and hereditaments ; and that in the last-mentioned suit the said surviving trustees might be decreed to make and execute such conveyance and assurance as was by the said decree, in the said original or former suit, dated the 28th of July, 1829, before set forth, directed to be made and executed.

The Defendants to the last-mentioned bill appeared, and put in their answers thereto, and thereby submitted to the judgment of the Court the question by the said bill raised.

The answers were replied to, and an order was made by the Court to read the proceedings in the first-mentioned cause on the hearing of the second-mentioned cause.

The last-mentioned suit came on to be heard on the 5th day of March, 1830, before the Master of the Rolls (Sir John Leach), whereupon, and upon debate of the matter, and hearing the will and two first codicils of the said testator, the proceedings in the said former cause, Langston against Pole and others, including the order dated the 23d day of February, 1826, the certificate of the Court of King's Bench, the order, dated the 17th day of March, 1828, the certificate of the Court of Common Pleas, and the decree on further directions, dated the 28th day of July, 1829, read, his Honour declared that the first son of the testator's son, the Respondent, James Haughton Langston, would take an estate in tail male under the said will, expectant on the decease of his father, James Haughton Langston : and the said Respondent, James Haughton Langston (the

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testator's heir-at-law), admitting the said will, and the codicils thereto, and that the said will and two first codicils, that is to say, the said codicil, dated the 21st day of June, 1808, and the said codicil, dated the 6th day of March, 1811, were duly executed and attested, so as to pass real estates, his Honour declared that the said will and two first codicils ought to be established, and the trusts thereof carried into execution by the Respondents, Sir Charles Morice Pole, and Haughton Farmer Okeover, the surviving trustees therein named, so far as relates to the settlement and conveyance of the manors, messuages, lands, tenements, hereditaments, and real estates of the said testator, and of the accumulations arising from the rents and profits thereof, during the minority of the Respondent, James Haughton Langston, and which, by the will of the said testator, were directed to be laid out and invested in the purchase of manors, messuages, farms, lands, tenements and hereditaments, and did order and decree the same accordingly: and it was ordered, that the Respondents, Sir Charles Morice Pole, and Haughton Farmer Okeover, the surviving trustees of the said will, should convey and assure the said manors, messuages, hereditaments, and accumulations therein mentioned or referred to, to the uses upon the trusts, and for the intents and purposes therein mentioned, or such of them as were then subsisting or capable of taking effect, but so as to limit the same to the use of the first son of the Respondent, James Haughton Langston, in tail male in remainder, immediately after the limitation to the use of trustees during the life of the Respondent, James Haughton Langston; such conveyance to be

settled by the Master to whom the former cause stood referred.

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The Master of the Rolls pronounced these decrees in conformity with the certificate of the Court of Common Pleas, and against that of the Court of King's Bench: but his Honour expressed an opinion, that the trustees would be justified in not executing the settlement without the sanction of the House of Lords, as to which of the two decisions of the courts of law was the right decision.

The trustees, therefore, declined to execute such settlement.

The appeal was against the decrees of the 28th day of July, 1829, and the 5th day of March, 1830 (that is to say), as to so much of the said decree of the 28th day of July, 1829, as declares, "that the first son of the testator's son, James Haughton Langston, will take an estate in tail male under the said will expectant on the decease of his father, James Haughton Langston, and as to so much thereof as directs that the certificate of the judges of his Majesty's Court of Common Pleas be confirmed, and that the said Defendants, Sir Charles Morice Pole, and Haughton Farmer Okeover, the surviving trustees of the said will, do convey and assure the said manors, messuages, lands, tenements, hereditaments, and accumulations therein mentioned or referred to, so as to limit the same to the use of the first son of the Plaintiff, in tail male in remainder, immediately after the limitation to the use of trustees during the life of the said Plaintiff;" and also as to so much of the said decree of the 5th day of

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March, 1830, as declares and directs to the same purport or effect.

For the Appellants, Mr. *Knight* and Mr. *Wray*.

For the Respondents, the *Solicitor-General* and Mr. *Jacob*.

9th June.

The *Lord Chancellor*.—In this case a question arose upon the construction, or rather upon supplying, if any way were open to us of supplying, a defect in the verbal construction, of the late Mr. Langston's will; and the question assumes an importance beyond even what naturally belongs to it, when we consider that two cases having been sent from the Court of Chancery and his Honour the Master of the Rolls to two different courts, the King's Bench and Common Pleas, these two courts certified directly in opposition to each other, but without any reasons, thus giving us occasion again to regret that practice which has of late years sprung up, but which I hope and trust is now about to be altered by reverting to the more ancient course. As, therefore, the opinions came back unaccompanied by the reasons upon which they were grounded, all that we know is, that the questions were argued by learned counsel in the two courts; that time was taken in each case for consideration; and that the question being, Whether Henry Langston took any and what estate under the will?—the Court of Common Pleas certified their opinion, that he took an estate in tail male, whereas the Court of King's Bench certified that he took no estate whatever.

The will contains a series of limitations. It is

drawn with great care; it is the production of a professional man; it is a production of great skill and experience; it is one of the most artificial, one of the most carefully conceived and most elaborately penned instruments, which it has ever been my lot to examine: nevertheless it does so happen, as if to confound the pride of human learning and expertness in legal matters, that this production of practised conveyancers, and upon which they have exhausted their skill, has as much occasion for the candid or rather the helping interposition of the court before whom it comes to receive effect, as if it had been penned, either by a peasant, without any professional aid; or by one of those rustic artists whose partial knowledge of conveyancing we have so often cause to lament—I mean those who sometimes make wills in the country for persons a little, and but a little, more ignorant than themselves, and whose handiwork so often occasions much labour and inextricable difficulties to courts of justice.

No person out of court can read this instrument without being perfectly persuaded that an accident must have happened, either in framing it originally, or in copying the draft, whereby a line or two have been left out; either the limitation intended to be inserted, and which was supposed to have been inserted, in the draft, was by some accident omitted, or, that limitation being in the draft, a couple of lines were passed over in copying the draft into the ingrossment. For instance, and to shew that this must have been the case,—the very first person who was likely to take any estate under the will, after the only son of the testator in *esse* at the date of his will, viz. the eldest

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son of that son, is disposed of by being omitted. He is not named there at all. "Then are you," say the Court of King's Bench, "to give him an estate tail, or any estate at all, when he is not even named in the will? Named he is for other purposes, and in other respects, but not to take anything, not to benefit under the will."

I here lay entirely out of view an incident which occurred during the argument. I desired to see the draft from which the ingrossment was made by copying, or partial copying; and one party were exceedingly anxious that this curiosity should be gratified, but that anxiety was met by an equal anxiety upon the opposite side that it should remain unsatisfied. One saw plainly enough what was likely to be the state of the fact; and though I had no right to let the draft influence my judgment, yet, humanly speaking, it was impossible not to wish to see whether the extra-judicial conjecture suggested by the instrument itself was well founded, namely, that the whole matter had arisen from an error in copying; and accordingly, we found a limitation to the first son of the testator's son, James Haughton Langston, which the person who made the ingrossment had passed over in copying the draft, having in his haste gone from the same word to the same word in a wrong line.

I here lay that entirely out of view; it has no right to enter into the consideration of the case; and I can most positively assure your lordships, that if I had not formed my opinion upon the instrument as it now stands, without matter *dehors*, without having recourse to the draft, I should not have relied at all upon that which the draft alone presents. We have no right to look at the draft,

but anybody who reads this will (and that is the first consideration in favour of agreeing with the Common Pleas rather than the King's Bench) cannot, if he has his senses about him, doubt that some such thing must have happened; and that is a legitimate ground of argument, because it is a reason derived not from matter *dehors* the instrument, but one for which you have not to travel out of its four corners. It is a reason, however, which does not carry us far, and would not suffice to dispose of the question, for we cannot exactly say what the omission was.

The next point to which I advert, as the second ground upon which I agree with the Common Pleas, and not with the King's Bench, is, that when the framers of this instrument really meant to exclude a child, or an eldest child, whether a son or a daughter, no persons knew better than they did how to effect that purpose. If your Lordships will look to the 6th and 7th and 9th folios of the Respondent's case, you will find that, in cases where they intended any such exclusion, they knew well how to effect it. Thus in the 6th, provision is made for raising portions "for all and every such daughter and daughters of his said daughter Caroline Langston, other than and besides an eldest or only daughter." So also in the 8th a term is created "for raising the portion and portions of all and every such daughter and daughters of his said daughter Elizabeth Catherine Langston, other than and except an eldest." So again, where a son of James Haughton Langston is to be excluded, it is "in case there should be any child or children of his body lawfully begotten, other than and besides an eldest or only

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“son of the said James Haughton Langston.”

This is a circumstance always of some weight ; it is a topic always worth considering. When you find that in one part, where the meaning is plain, and there is no doubt whatever as to the intention, the maker of the instrument adopts an effectual, clear, and precise mode of executing that intention, you may also safely and logically employ this to throw light upon other parts where the meaning is doubtful, and where the question is, whether he intended this or that provision. If you find that he does not in these places use the words which he has used where there was no doubt what his intention was, you have some right to say that he did not mean the same thing, because when he did clearly and undeniably mean this provision and not that, here is his mode of expressing himself in order to carry such intention into effect.

The third of the reasons, — and I go over them in moving your Lordships to affirm the judgment of the Court below, chiefly because of the conflict between the Courts of King’s Bench and Common Pleas, — but the third of the reasons is one which I cannot help feeling to be exceedingly powerful, and which, in all the views I can take of the subject, presses forcibly upon my mind. The existence of a son is to defeat no less than eight terms raised most carefully, artificially, and anxiously by the persons who penned this instrument ; and yet that son, whose existence is to produce such an effect, to deal about such havoc upon the whole of this will, — that son, whose bare coming in *esse* is so to disturb, nay almost destroy, the whole frame of the instrument, is not, according to the construction set up by the Appellant, and adopted

by the King's Bench, to benefit in the slightest degree. It is monstrous to suppose that any one, any rational testator, could really intend to make so much depend upon the event of a person coming into existence, which person, nevertheless, was apparently of no value in his eyes, except to be used as an instrument of destruction; that he was only to be the means of destroying the will, of taking away the benefit of its provisions from others, and yet was himself to profit nothing by that destruction.

Again, Henry Langston's existence must be allowed, according to the argument of the King's Bench and of the Appellants, to defeat nearly the whole of this will. Now there are two modes of reading an instrument: where one construction destroys and the other preserves, it is the rule of law and of equity, for it is a rule of common sense, which must be supposed common to both sides of Westminster Hall, that you shall rather lean towards that construction which preserves, than towards that which destroys. And this view (*Ut res magis valeat quam pereat*) ought also to be adopted where the question is not between two rival constructions of the same words in any instrument, but where the question is between reading the instrument verbally and literally as it is, and reading it so, and so supplying words as to take it in the way in which you have every reason to believe that the maker intended it should stand. Provided you derive your knowledge of the intention from the instrument itself, this latter course, which preserves and effects instead of destroying and frustrating, is to be preferred.

If this is a rule applicable generally, it surely is

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peculiarly applicable to a case like the present, in which a circumstance occurs which weighs materially in giving a larger effect than we otherwise might be disposed to give to these considerations, and may lead us to supply, more readily than we should otherwise be disposed to do, the words wanting: It is, that you are here dealing, not with a legal limitation, but with an executory trust. Nevertheless, my Lords, I confess that even if it had been a legal limitation, the reasons I have already given, and those I am about to add, which weigh more forcibly upon my mind, and are indeed decisive of the question, would have been quite sufficient to compel me to read the legal limitation, as the Court of Common Pleas has read this executory trust.

I wish to call your Lordships' attention to the very extraordinary effect which, of necessity, must follow from the construction put upon this will by the Court of King's Bench, looking only to that same clause which I have already referred to; I mean where the term is raised, which is to be found in the 9th folio of the Respondent's case (*antè*, p. 216.), and where the exclusion of James Langston's eldest or only son is effected by apt and proper words. From the provision made by the trusts of this term, according to the construction of the King's Bench, it would appear that this conclusion indisputably follows, that if there were one son and one daughter, then there is to be raised 25,000*l.* upon the daughter's estate, for the behoof of that daughter herself—which is really perfectly absurd. If the son is to take an estate, that you should provide most carefully for raising 25,000*l.* by a term of 600 or 700 years, for the benefit of

the daughter, is quite intelligible. But here, according to the construction the Court of King's Bench put upon the will, a sum of 25,000*l.* is to be raised, — for whom? Out of what estate? Not out of the son's estate, for, *ex hypothesi*, he does not take an estate tail, but out of the daughter's estate, for she takes it to the exclusion of the son: and for whose benefit is the 25,000*l.* to be raised? Not for the son, but for the daughter herself, who takes an estate burdened with her own term to raise her own 25,000*l.* I cannot help thinking that this point was never made in the Court of King's Bench: and it is to be observed that, though the case was argued before judges of profound learning, it was not in *banc*, but in the court of three judges, without the Chief Justice and the presence of the bar. But be that as it may, there seems no getting over the absurdity to which their construction leads. If I have a son and a daughter, and I give an estate tail to the son, there can be nothing more reasonable than my giving 25,000*l.* by way of charge upon that estate while the estate tail of the son lasts, in order that the daughter may be provided for. But who ever thought of giving no particular estate to the son, but giving the whole estate, or the first estate tail to the daughter, and then raising 25,000*l.* out of the daughter's own estate, for her own benefit, by way of a term attending her own estate tail in the same premises? No man in his senses can be supposed to have intended this.

But this is not all: the words of this will as they stood, without adding or altering, will bear out the construction of the Common Pleas. It is said, by those who maintain the construction or

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the King's Bench, that if you can construe an instrument without supplying or omitting anything, but, upon its own words, unaltered, unadded to, undiminished, you had better do so, as it is safer to take these terms than to introduce others. I agree with that proposition. Now it does so happen, that if you take these terms as they are here, and neither alter, nor add, nor diminish, but take the terms without inserting any limitation, the words themselves, which stand upon the face of the will, are sufficient to carry an estate tail in the first instance to Henry Langston, and to satisfy all the other terms and other limitations. I refer of course to the words "*other sons*," which plainly include him. But it is said by the Court of King's Bench, and by the Appellant, that "other" always means "younger," "posterior" — and I leaned at first towards this view of the subject: it is a very plausible argument, and in ordinary cases it is true in point of fact. If you were to say (in the usual way), first, second, third, fourth, and *other sons*, "other" must mean the sons after the fourth. But why does it mean those after the fourth? Only because you had before enumerated all that come before the fourth, for you had said first, second, third, and fourth. But suppose you had happened to omit the first, and instead of saying first, second, third, fourth, and other sons, you had said, second, third, fourth, and other sons, leaving out the first, then it is perfectly clear that "other" no longer is of necessity confined to the fifth, sixth, and seventh; but rather *ex vi termini*, includes the first, because the first is literally the one who answers the description of something other than the second, third, and fourth. The word "other"

would then just as grammatically, as strictly, and as correctly describe the first as the fifth, sixth, or seventh son, because the eldest son is a son other than the second, other than the third, other than the fourth. The only reason why "other," in all ordinary cases, and in the common strain of conveyancing, means a younger son, is, that no one ever thinks of leaving out the elder. If it were the custom to leave out the elder, and to begin with the second, then "other" would of course always suggest to one's mind the idea of the unnamed elder son, as well as the unnamed younger sons.

These are the grounds upon which I have formed my judgment, though with great deference for those I am compelled to differ from. I have taken a long time to consider it; I have frequently spelled over the instrument, and looked into the argument, of which I took a note at the time; and I really cannot say that I feel any doubt in agreeing with the Court of Common Pleas. My opinion is, that we are to read the will as if there had not been the omission of the limitation; but that even if we are to read the words as they stand, they are sufficient, literally and strictly construed, to carry an estat tail in the first instance to the elder son, and to limit all the other terms. We may either take the words as they stand, or we may take the whole instrument together, and consider the provisions for the whole of the eight terms, and the destruction set out, and the inconsistency arising from the creation of those eight terms, by construing the will the other way; and especially the absurdity of the daughter's taking an estate burdened

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in her own favour — taking it both as owner and incumbrancer by one and the same instrument.

Nothing is more common than to argue that words, which otherwise would give only an estate for life, give an estate in fee, if they are coupled with other words which intimate that there is to be a charge upon the estate which cannot take effect without the vesting of a fee. Any thing which extends beyond a life estate, is held to enlarge that estate into a fee, because it is clear that the person could not have intended, upon the whole, to give a life estate, when he imposes a burden which nothing but a fee can support. So in like manner, when a partial interest is given to A., which it can only be understood that A. would have any occasion for in the event of B. having the whole estate, can there be a sounder reason for so construing the instrument as to give the estate to B. and not to A.?

Upon the whole, I must advise your Lordships to agree with his Honour the Master of the Rolls, and to affirm the decree, which proceeds upon a preference given to Henry Langston, entitling him to take an estate tail under the will. I agree in the opinion that he took an estate tail under the words and provisions of this will, adding to the other circumstances this, that we are here dealing, not with a legal limitation, but with an executory trust; nevertheless, further adding, that if we were dealing not with an executory trust, but with a legal limitation, for the several reasons which I have given to your Lordships, my opinion still would be the same.

It is with great satisfaction that I am enabled to

state to your Lordships, that my noble and learned friend, the Lord Chancellor for Ireland, who also heard this case, has sent me a communication, that he has come to an opinion entirely in accordance with the decision of the Court of Common Pleas, and that he has no doubt whatever that the judgment which I am about to move is right. Whatever direction his Honour made as to the costs below, must be attended to. All the costs must be paid out of the fund.

Judgment affirmed.

The principal authorities cited were—*Doe v. Hallett*, 1 M. & S. 124. *Hay v. Lord Coventry*, 3 T. R. 83. *Roe v. Yeud*, 2 N. R. 222. *Doe v. Huthwaite*, 3 B. & A. 632. *Dashwood v. Peyton*, 18 Ves. 27. *Newburgh v. Newburgh*, 5 Mad. 364., and in D. P. on appeal*, Sess. 1825. MS.; and see *Falkener v. Falkener*, 1 Vern. 21. *Bamfield v. Popham*, 1 P. W. 54. *Scott v. Fenhoulett*, 1 Cox, 79. *Stebbing v. Walkey*, 1 Cox, 251. *Garvey v. Hibbert*, 19 Vesey, 125. *Gale v. Bennett*, Ambl. 681. *Wyth v. Blackman*, 1 Ves. sen. 196. *Beale v. Beale*, 1 P. W. 244. *Butler v. Duncombe*, 1 P. W. 448. *Duke v. Doidge*, 2 Ves. sen. 203. n. *Pierson v. Garnet*, 2 Bro. 47. *Hall v. Hewer*, Amb. 203. *Emery v. England*, 3 Ves. 232. *Lane v. Goudge*, 9 Ves. 225. *West v. Primate of Ireland*, 3 Bro. 148., 2 Cox, 258. *Street v. Torrington*, 2 Ves. sen. 564. 7 Bac. Ab. 340., 8 Vin. 180.

* N. B. This case will be reported in filling up the interval between the old and new series, which is in progress.

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(COURT OF CHANCERY.)

HENRY HOWARD, Esq. (Executor of
Charles, late Duke of Norfolk,
deceased) } *Appellant;*

The Right Honourable EDWARD,
Earl of DIGBY (Administrator of
Frances, late Dowager Duchess
of Norfolk, deceased) } *Respondent.*

F., upon her marriage with C., under the trusts of a marriage settlement executed in 1771, became entitled to annuities charged upon land, by way of pin-money, amounting to 1000*l.* *per annum*. C., who afterwards became Duke of Norfolk, died in 1815. In 1816, upon a commission of lunacy, F. was found a lunatic, without lucid intervals, from December, 1782. During all this time she had lived with her husband and in general society according to her rank. In 1820 F. died intestate.

Upon a bill filed in chancery by the administrator of F. against the executor of C., claiming arrears of pin-money from December, 1782, to the death of C.:—Held, upon appeal, reversing the decree of the Court below, that the claim under the circumstances was not sustainable.

IN the month of March, 1771, a marriage took place between Charles Howard (who afterwards became Duke of Norfolk), and Frances Fitzroy Scudamore.

Miss Scudamore was then seised in fee tail, or otherwise well entitled for an estate of inheritance

to divers manors, lordships, messuages, lands, tenements, woods, tithes, advowsons, and hereditaments, of very great value, situate in the counties of Hereford, Bucks, Gloucester, Monmouth, and Surrey; and she was also entitled to a sum of 26,482*l.* 12*s.* 2½*d.*

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Upon the treaty for the marriage, it was agreed between the parties that the sum of 5,482*l.* 12*s.* 2½*d.*, part of the money to which Miss Scudamore was entitled, should be retained by her for her separate use, to purchase clothes, jewels, and other necessities on the occasion of her marriage; and that the residue of the said money, amounting to the sum of 21,000*l.*, should be paid to Mr. Charles Howard (the late Duke) for his own use: and it was also agreed, that Miss Scudamore should convey and assure the manors, lordships, messuages, lands, tenements, woods, tithes, advowsons, and hereditaments, of which she was so seised upon and for the uses, trusts, and purposes therein mentioned; and that Mr. Charles Howard, on his part, should enter into certain covenants for settling and assuring unto Miss Scudamore, out of a sufficient part of the lands and hereditaments, then the estates of the most noble Edward, then Duke of Norfolk, when he, Mr. Charles Howard, should come into actual possession thereof, by virtue of certain settlements and entails, then subsisting thereof, a yearly sum of 300*l.* to her for her separate use for pin money; and that a provision for the separate use of Miss Scudamore, in the nature of pin money, should also be made for her out of her own estates.

Accordingly, indentures of lease and release and settlement, bearing date respectively the 22d and 23d days of March, 1771, were duly made and

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executed, previously to, and in contemplation of, the marriage. The release was made between Frances Fitzroy Scudamore of the first part; the said Charles Howard of the second part; Joshua Sharp and Henry Mountfort of the third part; Henry Curwen and John Scudamore of the fourth part; the Honourable Charles Fitzroy, and Samuel Masham Baron Masham, of the fifth part; Herbert Westfaling, esq., and Sir Chandos Hoskyns, bart., of the sixth part; Sir Francis Charlton, bart., Thomas Howard, esq., and Philip Howard, esq., of the seventh part; George Howard, esq., of the eighth part; and Charles Fitzroy Scudamore, esq. (the father of Miss Frances Fitzroy Scudamore), of the ninth part. After reciting the then intended marriage between Miss Scudamore and Mr. Charles Howard, and that in contemplation thereof the several matters hereinbefore mentioned had been agreed to, it was witnessed that, in pursuance of the said several agreements, and in consideration of the said intended marriage, she, the said Frances Fitzroy Scudamore (by and with the privity, consent, and approbation of the said Charles Howard, her intended husband), did grant, bargain, sell, alien, release, and confirm unto the said Joshua Sharp and Henry Mountfort, and their heirs, the manor of Homelacy, in the county of Hereford, and divers other manors, lordships, messuages, lands, tenements, woods, tithes, advowsons, and hereditaments, in the several counties of Hereford, Bucks, Gloucester, Monmouth, and Surrey, therein particularly described, with their rights, members, and appurtenances, to hold the same unto and to the use of the said Joshua Sharp and Henry Mountfort,

and their heirs, in trust for the said Frances Fitzroy Scudamore, and her heirs, until the solemnisation of the said intended marriage; and after the solemnisation thereof, upon trust, and to the intent and purpose that the said Joshua Sharp and Henry Mountfort might be perfect tenants to the freehold thereof, against whom five or more common recoveries therein-after covenanted to be suffered thereof, might be had and executed in such manner as therein-after is expressed: and it was thereby declared and agreed, by and between all the said parties thereto, that the said five several common recoveries, and all other recoveries of the said premises, should, from and immediately after the passing and suffering thereof, be and enure; and that the recoverors in the said recoveries should, from and immediately after the passing and suffering thereof, stand and be seised of the advowsons and rights of patronage therein mentioned, to the use of the said George Howard and his heirs, for and during the natural life of the said Charles Howard, upon trust for certain purposes therein declared: and from and after the decease of the said Charles Howard, to the use of the said Frances Fitzroy Scudamore, and her assigns, for and during the term of her natural life, with remainder to the said Henry Curwen and John Scudamore, and their heirs, during the life of Frances Fitzroy Scudamore, upon trust to preserve the contingent remainders therein-after limited.

And as to, for, and concerning the said manors, and all other the hereditaments and premises thereby granted and released (except the said advowsons and rights of patronage), to the use, intent, and purpose, that the said Charles Fitzroy

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Scudamore, and his assigns, should, during his life, receive one annuity, or yearly rent or sum, of 1000*L.*, to be issuing out of the said manors, hereditaments, and premises; and to the further use and intent that the said Charles Fitzroy, and Samuel Lord Masham, and their heirs, should and might, yearly and every year, during the joint lives of the said Charles Howard, Frances Fitzroy Scudamore, and Charles Fitzroy Scudamore, her father, have, receive, and take, one annuity, or yearly rent or sum, of 500*L.*, of lawful money of Great Britain, to be issuing and going out of the said manors or lordships, messuages, lands, tenements, hereditaments, and premises, and to be paid and payable yearly and every year during such joint lives, at the times, and in the manner and upon the trusts therein-after mentioned and declared of and concerning the same: And to the further use, intent, and purpose, that in case the said Charles Fitzroy Scudamore should depart this life at any time in the lifetimes of them the said Charles Howard, and Frances Fitzroy Scudamore, his intended wife, then the said Charles Fitzroy and Samuel Lord Masham, and their heirs, should and might have, receive, and take one annuity, or yearly rent or sum, of 700*L.*, of lawful money of Great Britain, in lieu of the said therein-before mentioned annuity, or yearly rent or sum of 500*L.* (which said annuity, or yearly rent or sum of 500*L.*, was, in case of the last-mentioned event or contingency happening, from thenceforth to cease). And the said annuity, or yearly sum of 700*L.*, should be yearly payable to the said Charles Fitzroy, and Samuel, Lord Masham, and their heirs, at the times and in the manner, and

upon and for the trusts, intents, and purposes therein-after expressed and declared concerning the same; and powers of entry, distress, and perception of rents on the said manors, hereditaments, and premises, were thereby given to the said Charles Fitzroy, and Samuel Lord Masham, and their heirs, for recovering the annuities of 500*l.* and 700*l.*, in case the same should be in arrear.

And as to the said manors, hereditaments, and premises (subject to the annuities of 1000*l.*, 500*l.*, and 700*l.*): to the use of Herbert Westfaling, and Sir Chandos Hoskyns, their executors, administrators, and assigns, for the term of 400 years, without impeachment of waste, upon the trusts therein-after declared concerning the said term: and from and after the determination thereof, to the use of the said Sir Francis Charlton, Thomas Howard, and Philip Howard, their executors, administrators, and assigns, for the term of 500 years, without impeachment of waste, upon the trusts therein-after declared concerning the same: in the meantime subject thereto, and chargeable as therein-before mentioned, to the use of the said Frances Fitzroy Scudamore, and her assigns, during her life, without impeachment of waste, and with such power of leasing as therein-after mentioned, with remainder to the use of the said Henry Curwen, and John Scudamore, and their heirs, during the natural life of the said Frances Fitzroy Scudamore, upon trust to preserve the contingent remainders therein-after limited, with remainder, after the decease of the said Frances Fitzroy Scudamore, to the use of the said Charles Howard, and his assigns, during his life, without

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impeachment of waste, and with such powers of leasing as therein-after mentioned ; with remainder to the said Henry Curwen, and Philip Howard, and their heirs, during the natural life of the said Charles Howard, upon trust to preserve the contingent remainders therein-after limited ; with remainder (as to all the manors, hereditaments and premises thereby granted and released), from and after the decease of the survivor of them, the said Charles Howard and Frances Fitzroy Scudamore, to the use of the son or sons of the said intended marriage, in manner therein mentioned ; and for default of such issue, to the use of such person or persons, for such estate or estates, as the said Frances Fitzroy Scudamore should, in manner therein mentioned, direct or appoint ; with remainder, in default of such appointment, and subject thereto, to the use of the heirs of the body of the said Frances Fitzroy Scudamore ; with remainder to the use of the right heirs of the said Frances Fitzroy Scudamore.

And as to, for, and concerning the said two several annuities or yearly rent charges of 500*l.* and 700*l.*, it was thereby declared and agreed that the same were so limited to them, the said Charles Fitzroy and Samuel Lord Masham, and their heirs, upon trust, that they, the said Charles, Fitzroy and Samuel Lord Masham, and the survivor of them, and the heirs of such survivor, should, from time to time, pay, apply, and dispose of the said several annuities of 500*l.* and 700*l.*, or such of them as should become due and payable, by quarterly payments, under which the said trustees should become entitled to receive the same, unto such person and persons only, and for such intents and purposes

only, as the said Frances Fitzroy Scudamore should, by any writing or writings, to be signed with her hand, from time to time, notwithstanding her coverture, direct or appoint. And in default of such direction or appointment, and in the mean time, and from time to time, until the said Frances Fitzroy Scudamore should make any such direction or appointment, should pay the said several annuities of 500*l.* and 700*l.*, as the same should be severally had and received, or so much thereof whereof she should make no such direction or appointment, into the proper hands of the said Frances Fitzroy Scudamore, for the sole and separate use and benefit of her the said Frances Fitzroy Scudamore, exclusive of the said Charles Howard, who was not to intermeddle therewith, nor was the same to be subject to his debts or engagements; and the receipts and discharges of the said Frances Fitzroy Scudamore, and of such persons as she should, from time to time, direct or appoint to receive, all or part of the said annuities or yearly rents of 500*l.* and 700*l.*, as the same should become due and payable, or as she should become entitled thereunto respectively, should, from time to time, be good and effectual releases and discharges for such sums of money as in such receipts and discharges should be expressed to be received.

And as to the said term of 400 years thereinbefore limited in use, to the said Herbert Westfaling and Sir Chandos Hoskyns, their executors, administrators, and assigns, it was thereby declared and agreed that the said term of 400 years was so limited as aforesaid, in trust, in the first place, for the further and better securing the due payment, as well of the said annuity or yearly rent

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of 1000*l.* therein-before limited in use unto the said Charles Fitzroy Scudamore, and his assigns for his life, as of the said several other annuities or yearly rents of 500*l.* and 700*l.* therein-before limited, in use to the said Charles Fitzroy and Samuel, Lord Masham, and their heirs, during the joint lives of the said Charles Howard and Frances Fitzroy Scudamore, for her separate use, or so much thereof as should become due and payable; and for that purpose, in case any of the said annuities or yearly sums of 1000*l.*, 500*l.*, and 700*l.*, or any part thereof, should happen to be behind, or unpaid, by the space of sixty days next over or after any of the days of payment, whereon the same are therein-before respectively appointed to be paid, that then, and so often, it should and might be lawful to and for the said Herbert Westfaling and Sir Chandos Hoskyns, and the survivor of them, and the executors, administrators, and assigns of such survivor, and he, and they, was, and were, thereby directed, from time to time, by and out of the rents, issues, and profits of all or any of the said hereditaments and premises therein-before limited to them for the said term of 400 years, or by mortgage, or sale of a competent part thereof, for all or any part of the said term, or by bringing actions against any of the tenants or occupiers of the said hereditaments and premises, for the recovery of the rents then in arrear, or by making entries upon the same premises, or any part thereof, or by any of the said ways or means, or by any other ways or means whatsoever, to levy, raise, and pay such sum or sums of money as should be sufficient to pay and satisfy the said several annuities or yearly rents of 1000*l.*, 500*l.*, and 700*l.*, unto the several persons.

to whom the same were respectively thereby appointed to be paid, or so much thereof as should, from time to time, so happen to be behind and unpaid, together with all the costs, charges, and expenses which the same person or persons, or the said trustees of the said term of 400 years, their executors, administrators, or assigns, or any of them, should sustain, expend, or be put unto, for, or by reason of the non-payment thereof.

And the trusts of the said term of 500 years were declared to be for raising portions for the daughters of the said marriage. And after reciting that, under and by virtue of certain indentures of lease and release, bearing date, respectively, the 10th and 11th days of June 1767, and of two common recoveries suffered in pursuance thereof, the castle of Sheffield, and divers manors, messuages, lands, tenements, and hereditaments, in the county of York, and elsewhere, therein particularly mentioned, did stand limited, to take effect on the decease of Edward, then Duke of Norfolk, and failure of issue male of his body, and on the determination of a certain term of 300 years, to be computed from the decease of the said Edward, Duke of Norfolk, and subject to that term, in the mean time, to the use of the said Charles Howard for his life, without impeachment of waste, with remainder to trustees, to preserve contingent remainders; with remainder to the first and other sons of the said Charles Howard (party thereto) successively, in tail male, with other remainders over: It was further witnessed, that, in pursuance of the agreement entered into on the said treaty of marriage, and for the considerations before mentioned, he, the said Charles Howard, did thereby for himself,

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his heirs, executors, and administrators, covenant, promise, and grant to and with the said Herbert Westfaling and Sir Chandos Hoskyns, their executors, administrators, and assigns, that, in case the intended marriage should be had and solemnised, he, the said Charles Howard, should and would, within twelve calendar months next after the solemnisation thereof, make or execute one or more sufficient grant or grants, demise or demises, unto them, the said Herbert Westfaling and Sir Chandos Hoskyns, their executors, administrators, and assigns, if he, the said Charles Howard (party thereto) should so long live, of a sufficient part of the said castles, manors, lands, hereditaments, and premises, in the county of York, or elsewhere, not being of less annual value than 800*l.* by the year, and of his reversionary estate and interest therein, unto them, the said Herbert Westfaling and Sir Chandos Hoskyns, their executors, administrators, and assigns, to hold unto them, the said Herbert Westfaling and Sir Charles Hoskyns, their executors, administrators, and assigns, for the term of 99 years, if the said Charles Howard (party thereto) should so long live, upon trust, that when and so soon as the said Edward, Duke of Norfolk should depart this life, he dying without issue male of his body, lawfully begotten, in the lifetime of the said Charles Howard (party thereto), they, the said Herbert Westfaling and Sir Chandos Hoskyns, and the survivor of them, should, by all proper ways and means, levy and raise, yearly and every year, during the joint lives of them, the said Charles Howard and Frances Fitzroy Scudamore, his intended wife, the annual sum of 300*l.* by the year, tax free, and without deduction, and should, from

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time to time, pay and apply the same, by quarterly payments, unto such person and persons, and for such intents and purposes, as she, the said Frances Fitzroy Scudamore, should, by note in writing, from time to time, direct or appoint, notwithstanding her coverture; and when and so often as no such direction or appointment should be made, should pay the said annual sum, or so much thereof whereof no such appointment should be made as aforesaid, into the proper hands of her, the said Frances Fitzroy Scudamore for her separate use, and in augmentation of the pin money therein-before appointed to be paid to her out of her own estates, and in which grant or grants, demise or demises, he, the said Charles Howard, should enter into proper covenants for the due payment of the said annual sum of 300*l.*, from such the death of the said Edward, Duke of Norfolk, he dying without issue male as aforesaid, unto the said trustees, for the purposes aforesaid, in such manner as should be reasonable in that behalf.

The marriage took place, and recoveries were suffered according to the covenants in the settlement.

In the month of September 1777, Edward, Duke of Norfolk, died without issue, and thereupon Mr. Charles Howard became Duke of Norfolk, and also became entitled in possession to the estates in the county of York mentioned in the settlement, and thereupon his wife, the late Dowager Duchess of Norfolk, became entitled to receive, during the joint lives of herself and her husband, Charles, late Duke of Norfolk, the said annuity or yearly rent charge of 300*l.*, under the trusts herein-before mentioned, and in augmentation of the pin money secured to her out of her own estates.

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In the year 1782, Charles Fitzroy Scudamore, the father of the duchess, died, and from the time of his death she became entitled, under the trusts of the settlement of her estates, to receive, during the joint lives of herself and the said Charles, late Duke of Norfolk, her husband, the yearly rent charge of 700*l.* for her separate use, for pin money, in lieu of the yearly sum of 500*l.*, theretofore payable for that purpose, and in addition to the yearly rent charge of 300*l.* payable out of her husband's estates, according to covenant in the settlement.

Charles, Duke of Norfolk, made and published his last will and testament in writing, dated the 25th day of November 1815, and thereby appointed the Appellant, Henry Howard, executor.

On the 16th day of december 1815, Charles, Duke of Norfolk, died, leaving the duchess, his widow, surviving; his will was proved by the Appellant in the Prerogative Court of Canterbury, and he possessed himself of the personal estate of the testator.

In the month of April 1816, a commission, in the nature of a writ *de lunatico inquirendo*, under the great seal of Great Britain, was awarded and issued, directed to certain commissioners therein named, to inquire of the lunacy of Frances Fitzroy Howard, Dowager Duchess of Norfolk, and thereupon she was duly found and declared to be a lunatic, and that she did not enjoy lucid intervals, so that she was not sufficient for the government of herself, her manors, messuages, lands, tenements, goods, and chattels; and it was also thereupon found and declared that she had been in the same state of mind from December 1782.

Various proceedings were had under this commis-

sion of lunacy; and, by an order made by the Lord Chancellor, bearing date on the 13th of August 1817, in the matter of the lunacy, it was ordered that the care and custody of the person and estate of Frances, Dowager Duchess of Norfolk, should be granted to the Respondent, and to Sir Edwin Francis Stanhope, and Daniel Burr; and that all further proceedings in the affairs of the lunatic should be carried on and conducted by and on behalf of the Respondent, and Sir Edwin Francis Stanhope, and Daniel Burr, as committees of her person and estate.

It was alleged, that from the month of December 1782, no part of the yearly rent charges of 700*l.* and 300*l.* secured to her grace by the settlement, for pin money, was paid to her, or to her separate use, or according to her appointment, or otherwise applied for her benefit, pursuant to the trusts of the settlement; and that none of the trusts declared of the said several annuities or yearly rent charges of 700*l.* and 300*l.* for pin money, or for securing payment thereof, were executed from the month of December 1782. Upon this ground, by an order made in the matter of the lunacy, bearing date on or about the 10th day of August 1819, it was ordered and directed that the Respondent and Sir Edwin Francis Stanhope, and Daniel Burr, as such committees, should be at liberty to institute a suit in the Court of Chancery, against the Appellant, as the executor of Charles, Duke of Norfolk, and all other proper parties, for the recovery of the arrears of the yearly rent charges of 700*l.* and 300*l.* from the month of December 1782, till the time of the death of the duke, if so advised by counsel.

In May 1820, the Respondent and the other

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committees filed a bill in the Court of Chancery, in their own names, against the Appellant, to recover those arrears ; but on 23d of October 1820, before any answer was put in to that bill, the lunatic, Dowager Duchess of Norfolk, died intestate, and soon after her death, letters of administration of her personal estate and effects were granted to the Respondent, by the proper Ecclesiastical Court, and the Respondent thereby became the legal personal representative of the duchess.

By the death of the duchess, all the interest of the Respondent and Sir Edwin Francis Stanhope, and Daniel Burr, as such committees, determined, and the suit was wholly at an end.

In April 1823, the Respondent filed his original bill in chancery in this cause against the Appellant, stating the facts herein-before mentioned, and praying " that it might be decreed that the arrears " of the annuities or yearly rent charges of 700*l*. " and 300*l*. from the month of December 1782, " till the time of the death of Charles, late Duke " of Norfolk, were due to the estate of Frances, " Dowager Duchess of Norfolk ; and that an " account might be taken, by and under the " direction of the Court, of what was so due in " respect of such arrears ; and that the same might " be paid to the Respondent, as the personal " representative of Frances, late Dowager Duchess " of Norfolk, out of the personal estate of Charles, " late Duke of Norfolk, and if the Appellant, " Henry Howard, should not admit assets of " Charles, late Duke of Norfolk, sufficient to satisfy " the arrears, then that an account might be taken " in the usual manner, by and under the direction " of the Court, of the estate and effects of Charles,

“late Duke of Norfolk ; and that what should be
 “so found to be due, might be paid thereout to
 “the Respondent, as the personal representative of
 “Frances, late Dowager Duchess of Norfolk, in a
 “due course of administration, and for general
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In July 1823, the Appellant put in his answer to the bill and thereby, among other things, admitted that the estates, in the bill of complaint, mentioned to have been released and settled in and by the indenture of the 23d of March 1771, were of great value ; and that the rents, issues, and profits thereof, subject to the charges and outgoings affecting the same, and thereout paid, were received and enjoyed by the late Duke of Norfolk from the month of December 1782, till the time of his death, in addition to the estates to which he was entitled in his own right, under the settlement of the ancient domains of the Dukes of Norfolk ; and that such last-mentioned estates were of very great value ; and it was also thereby admitted that the income of Charles, Duke of Norfolk, during the period in the bill mentioned, was amply sufficient to enable him to maintain a separate establishment for the duchess, suitable to her rank, without applying any part of the rent charges of 700*l.* and 300*l.* for that purpose ; and that the Appellant was possessed of personal estate and effects of Charles, late Duke of Norfolk, and of real estates, to an amount and value more than sufficient to pay his just debts, which had come to the knowledge of the Appellant, and also the alleged arrears of the annuities or yearly rent charges of 700*l.* and 300*l.*

The answer was replied to, but no witnesses were examined on either side.

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The following admissions were signed on behalf of the Plaintiff and Defendant : —

“ It is agreed, for the purposes of the discussion, “ that the said duchess shall be considered to have “ been a lunatic from 1782, without lucid intervals; “ this to be without prejudice to the Defendant’s “ hereafter going into evidence to prove lucid “ intervals, if the Court shall be of opinion that “ the rights of the parties would be affected by “ that being proved.”

“ The Plaintiff alleging that the money expended “ upon the establishment of the duchess was “ much less than the amount of her separate “ income, and the Defendant alleging that it “ considerably exceeded it; it is agreed, for the “ purposes of the discussion, that the fact as to “ such deficiency or excess shall not be assumed “ either way, but that a reference shall be made to “ the Master, to inquire into the fact, if in the “ opinion of the Court, the rights of the parties “ would be affected by the proof of such fact “ either way, it being admitted that no direct pay- “ ment was made to her separate use, according to “ the strict provision of the settlement.”

The cause came on to be heard before the Vice-Chancellor in Michaelmas term 1831, and, having been fully argued * before him on the 7th and 8th of November 1831, his Honour declared, that the arrears of the annuities or yearly rent charges of 700*l.* and 300*l.* in the pleadings mentioned, from December 1782, till the time of the death of Charles, late Duke of Norfolk, which happened on the 15th December 1815, were due to the estate of Frances, late Dowager Duchess of Norfolk; and

* See 4 Simon’s Rep. 588.

his Honour ordered and decreed, that it should be referred to the Master in rotation, to compute such arrears, and to tax the Respondent's costs, in case the parties differed; and the Defendant, by his answer admitting assets, it was ordered, that he should pay to the Respondent, as the legal personal representative of Frances, late Dowager Duchess of Norfolk, the amount of such arrears, and such costs, and either of the parties was to be at liberty to apply to the Court as there should be occasion.

Against this decree, the executor of Charles, late Duke of Norfolk, appealed.

For the Appellant, Sir *Charles Wetherell* and Sir *William Horne*.

For the Respondent, the *Solicitor-General* and Mr. *Stuart*.

The *Lord Chancellor*.—Upon one part of this case I entertain so clear an opinion, differing from that of the Court below, that I shall dispense with the necessity of a reply upon such part of the argument for the Respondent as touches it, reserving to the learned counsel for the Appellant, if they, upon further reflection, shall be so advised to urge their argument in the reply *quoad* the rest of the case, which may form a considerable portion of the whole sum in dispute.

I regard this question as one of considerable importance; of some interest, from the peculiarity of the facts; and of novelty, in respect of judicial decision. It is a case of the first impression; for there is no decision, there are, indeed, no *dicta*, in any other case; nor is there any authority of any text-writer which can be cited either appli-

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cable to it, or at all bearing upon it so as to throw any light upon the argument.

The facts of the case were shortly these:—Charles, Duke of Norfolk, then Mr. Howard, heir apparent to Mr. Howard, of Greystoke, in Cumberland, and son of the heir presumptive of Edward, then Duke of Norfolk, intermarried, in the year 1771, with Miss Frances Fitzroy Scudamore, a lady of large fortune, her property in land at that time consisting of from 4000*l.* to 5000*l.* a year, in the county of Hereford and other counties; her property in money amounting to 24,000*l.* The whole of that money, with the exception of such part as might be necessary for her *paraphernalia* at the marriage, was taken possession of under the contract of marriage by the husband; the rents and profits of the estates, by operation of law during the coverture, became his; but, by the marriage settlement, there was a provision made for the separate use of the wife to this effect: that, in respect of pin money, the recital (the preamble of the settlement) states that it had been agreed to provide so much, to be afterwards increased so much. The operative part of the instrument drops the name of “pin-money;” and not recurring to “pin-money,” settles, in trustees for her life, 700*l.* a year, reserved out of the rents and profits of her estates; but as those rents and profits became the husband’s, this 700*l.* was as much given by him as if it had been given out of the reversion of the Greystoke estates in the possession of his father, which would come, and which eventually did come, to him upon his father’s death, and were put in settlement and conveyed to that amount; or as if it had been given

out of any of the Norfolk estates when they should be vested in his possession. This yearly sum coming out of her property makes no difference whatever in the legal effect and substance of the provision; because, whether he gave it out of his own estates or reserved it out of her estates, he equally infringed upon his own right. The *jus mariti* would have vested the whole rents and profits of her estates just as much as of his own estates in himself during the coverture. There is a reference in the latter part of the deed to the same sum of 700*l.* a year, as follows: "That when he should succeed to the estates in which he was severally heir apparent and heir presumptive, the Greystoke estates as heir apparent, and the Norfolk estates as heir presumptive, that 300*l.* a year should be added to the 700*l.* a year, as it is there said to increase by so much the sum of 700*l.* a year already set apart for the wife, in respect of pin money, or the augmentation of the pin money *herein-before set apart* and provided for Mrs. Howard." There is then another provision made, contingent on the succession devolving upon him of these magnificent estates: 2000*l.* a year was to be added to her then jointure; the consequence of which was, that on surviving her husband she was to enjoy the whole rents and profits of her own estates, supposing there was no issue of the marriage, and 2000*l.* a year if he succeeded to his expected property.

Such was the state of matters at the marriage which was then solemnised. From a very early period, unhappily the mind of the duchess proved to be unsound, though no commission of lunacy was then taken out against her: she remained

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cohabiting with her husband; that is to say, living in the same house, and even occupying the same chamber with him, till the year 1809. For the next six years of the duke's life there was, I think, more of separation. But this is at any rate certain, that during the period from the year 1782 to December 1815, when his grace died, by the inquisition under the commission of lunacy, sued out, for the first time, upon the duke's death, she was found to have been of unsound mind. She survived her husband five years. In 1820, a bill was filed, upon the suggestion of Lord Eldon, then sitting in matters of lunacy. This bill, filed after her death, led to the decree which is now brought under the review of your lordships by the present appeal.

The duchess (an important fact, which is not denied) continued to enjoy good bodily health. She lived not much in society, but was not confined. She went about; she was visited and visiting to a certain extent; and the duke, it is not denied, (but if so, that will be the subject of inquiry,) paid for her maintenance; and when living separate for several years, as she did generally, and having a separate establishment, no doubt he paid all those *paraphernal* expences, all those personal expences with which more or less pin-money has connection.

The committee having done nothing in this matter during her grace's life, and making no claim at all, as I understand, the personal representatives of the duchess prefer a claim against the personal representatives of the duke, to this effect, and amount: they say; The duchess had a right to pin-money; first 700*l.*, and then 1000*l.* a year. If she had been a person of sound mind, the de-

mand could not have gone back beyond a year ; because, beyond a year, or a year and a fraction, the Court never has allowed pin-money claims to go back. But this is said to be upon the presumption that the wife, by acquiescence, releases the claim, and as that presumption can have no place in the case of a lunatic, the Court, it is contended, is not confined to the year or the year and a fraction, in this case, as it would be in any other. It is contended that you must go back the whole time ; and, accordingly, \$2,000L. ; or thereabouts, is the sum which is substantially awarded by this decree to be paid by the personal representatives of the duke to the personal representatives of the duchess in respect of an unsatisfied and unreleased claim of pin-money.

Now first, I must observe, that there is no case in which it has ever been held, as far as I know, that the personal representatives of the wife can go back for a year, or even any part of a year, for the arrears of pin-money. That the wife herself can go back is admitted ; but then they say, on the part of the Respondent, if the wife can go back for a year, it follows, as a matter of course, that her representatives can go back ; because, how can one have a claim which does not survive to the representative ? I see a very material difference between the wife herself and her personal representative, in respect of pin-money. There may be no difference in the case of an ordinary debt, where there is no peculiar relation between the debtor and the creditor ; which peculiar relation it is that distinguishes pin-money from all other cases. What signifies it to the debtor whether he pays the creditor himself or his personal

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representative? What signifies it to me if I owe 1000*l.* (an annuity) to A. B., whether A. B. dies and I pay it to C., his representative, or pay it to A. B. himself? I am bound to pay him and his executors, administrators, and assigns; and though at law my debt is not assignable, yet in Equity it is assignable, and I am bound to pay the representative just as much as I was bound to pay the original creditor. But is that the same entirely and in all respects with pin-money? Very much the reverse. This leads me to consider what pin-money is; for what purpose it is given; with what view it is set apart and provided; in what right the wife enjoys it; and by what obligation the husband pays it. It is not an ordinary case. It is not a gift from the husband to the wife out and out. It is not to be considered like money set apart for the sole and separate use of the wife during the coverture, excluding the *jus mariti*; but it is a sum set apart for a specific purpose, due to the wife in virtue of a particular arrangement, payable by the husband, by force of that arrangement and for that specific purpose. I am subject to be corrected upon this as upon all other subjects, and to be better informed; but I have not in this case received any such correction; I have not had the benefit of any light better than I possess myself. I have heard nothing whatever to shake my opinion, that pin-money is, with respect to the personal expence of the wife, for the dress and the pocket-money of the wife: from its very name there is a connection with the person. It means that which goes to deck or attire the person of the wife, and, as I should say, upon a somewhat larger construction, to pay her ordinary personal expences. A person in a humble

station of life pays his wife's bills as he pays his own. A person a little higher is accustomed to make, for common convenience, an allowance of so much for house-keeping expences, if she is *præposita rebus domesticis*, and so much over for her own dress and the dress of her children. A person in a higher station still makes a general arrangement which probably extends over years, if not over the whole coverture; and a person in a higher station still, makes the arrangement of pin-money by the marriage settlement, which is as much as to say, "You, the wife, shall not be reduced to the somewhat humiliating necessity of disclosing to me every want of a pound to keep in your pocket, or of taking my pleasure, and obtaining my consent every time you want to go to the milliner's shop to order a dress for yourself; but you shall have so much, consistent with my estate and my income, which you shall retain apart from me, and exempt from my control." It is a refinement which the law has introduced peculiar to the bargain or arrangement previous to and upon the marriage. The husband, exempting it from his control, may be supposed to say, "There shall be your dress-money, your pocket-money, your fund for separate personal expences, set apart for you during the coverture."

Now, this I take to be clearly the nature of pin-money; and if it be so, it is equally clear that no nobleman or person of a high and honourable degree, being in wealthy circumstances, would ever dream of making an allowance to his wife for pin-money, if he were at the same time to be paying all her bills year after year, her milliner's bills, and

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others, over and above her pin-money. If it is the right construction of law upon pin-money that the husband is to pay the bills, although he has provided the other fund, the sooner it is known to all persons about to enter into the state of matrimony the better. But that being clearly, according to my view of the case, not the intendment of the law upon the subject, and pin-money being such as I have described, what follows? I take this to follow, that there is a difference between this and a debt to strangers; a difference arising from a separate fund being set apart as pin-money, and from the mode in which it is to be expended,—the kind of expence which it is intended to defray,—an expenditure in which the husband, as well as the wife may be said to have an interest. The wife is to dress according to his rank, not her own. Here the lady became the wife of Mr. Howard of Greystoke immediately, but she became in expectancy a duchess; because her husband, as it was known at that time, stood in the line of succession, and made provision for the event of his succession, to Duke Edward. He was to pay to his wife, as duchess, so much more jointure, and so much more pin-money. On Duke Edward's decease, she was to become the very first lady in the land of a subject; she was to be provided for according to the magnificence of that high station of Premier Duchess, Countess, and Baroness of England, occupying the highest station which any female subject of the King could possess out of his own royal family: she was then to be adorned, according to her degree, not as Miss Frances Fitzroy Scudamore, but as the wife of Charles Duke of Norfolk, Earl Marshal of England. She was to

maintain that station which she derived from being his consort; a station next to royalty in the society of this country. It was, therefore, the duke's interest that this money should be retained for supporting his wife's rank; and this ample provision was made plainly with a view to supporting the station of his wife. The duke, her husband, had the fund in a certain degree in his own power; and it is in contemplation of that power that the law says, "You shall not go back beyond a year." If his wife chooses to dress herself like a mechanic's housewife or a farmer's dame, instead of the first duchess of the land, and to pay 20*l.* of her 1000*l.* a year, instead of appearing in the attire becoming her condition; if, instead of paying for dress, of which the Duke of Norfolk would have no reason to be ashamed when he took her to Court, she dressed like a tradesman's wife, — the Court of Chancery would not have given her an account of the fund. It is an error to suppose that the ground on which the Court of Chancery would refuse to go back a year, is only because of the supposed satisfaction or acquiescence; that is not the sole reason. The Court refuses to go back for this obvious reason — that the money is meant to dress the wife so to keep up the dignity of the husband, not for the mere accumulation of the fund; and as it is meant that the money should be expended for the husband's honour, to support his and her rank in society, she would in vain come to the Court of Chancery, and say, "Pay 900*l.* into my banker's "for eleven years, for I only spent 100*l.* when it "was meant that I should spend 1000*l.*" The Court of Chancery would say, "Your grace comes "here in vain; you might have asked it year by

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“ year, and we should have given it you.” Now, observe, this provides a check and control to the husband; it prevents the wife from mispending the money; it secures the appropriation of the money to its natural and original purpose; and it is for that view, quite as much as on account of the presumed satisfaction by acquiescence, that the Court of Chancery, on principle, and by a settled rule on the subject, will not allow a wife to claim pin-money beyond a year. This illustrates the reason urged by Sir *Charles Wetherell*, and the distinction he justly took in the course of his argument between the representative taking the money, and the wife herself taking it. It is one thing to say that during the wife’s lifetime a year’s arrear shall go to the wife, and a totally different thing to say that the Duke of Norfolk shall pay the wife’s personal representative 1000*l*. The Court sees that the Duke of Norfolk will have some interest and advantage in having paid the wife 1000*l*. of arrear, because it pays the milliner’s bills, which, but for that, he is liable to pay: if she has run up 1000*l*. of debt with her milliner for dress, or with her jeweller for the wear and tear of *paraphernalia*; if she has incurred a bill which is consistent with the degree and station of the duke in the Peerage, — he might be compelled by an action at law to pay it. But if the pin-money is paid to the representative of the wife, the duke is still liable to the action. That forms a most material distinction between this and the case of a common debt. If I have a debt against the Duke of Norfolk, it is quite immaterial to him whether he pays it to me or my representatives after my death; because if he pays it to my representatives he is not liable to pay it

over again : but very different is this debt of pin-money ; for if he pays it to his duchess's representative the year after her death, he is liable to pay to the duchess's milliners, if they bring an action against him the day after he has paid it to the duchess's personal representative. This is a convincing proof of the total difference between the two cases. It illustrates strongly that which is the foundation of my opinion — the difference between pin-money and other claims ; but it also answers, and, I think, irresistibly answers, the argument urged with some plausibility for the Respondents, that if the money due to the duchess were a year's arrear, or a year and a fraction's arrear, as one of the cases gives it, therefore it must be equally due to the duchess's representatives. No case can be produced which shows that a single farthing has been given by the Court of Chancery, even for a month's arrear of pin-money, to the wife's representatives. To the wife herself it has been given ; to her representatives never.

I have dwelt so long upon this topic, not merely to illustrate the distinction I take between pin-money and other separate estate of the wife, but for another reason also — because it carries your Lordships a good way in the argument of the case upon the part of it which I am about now to dispose of, and materially aids Sir *Charles Wetherell's* contention upon the other part of the case, where he denies altogether the liability even for one year's arrear of this pin-money, — denies that the personal representatives of the duchess have a right to claim it against those of the duke.

I proceed to apply the argument to the first part of the case, with which alone I am now

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dealing. It is surely a very imperfect view which is taken of the foundation of the cases in Chancery allowing a year's arrear to be claimed by the wife during her life, to say that this is owing to a presumption of satisfaction of the former years: I think that is not the only foundation. I have suggested another, from the nature of pin-money; but I will state to your Lordships a ground which seems, in the present case, decisive against the judgment of his Honour: there is a presumption of actual satisfaction of the party's demand in this way. The wife having the pin-money allowed her for the purpose of her apparel and pocket-money, the Court says, "We will not suppose you to be above a year without the means of dressing yourself according to your rank, or paying your tradesmen's bills; but we will suppose that the year before, and in all preceding years, they were paid by the husband; and we know that if he has not paid them, he is liable to pay them, being for necessaries, according to his state and degree." Can any person doubt, who considers the subject, that precisely the same presumption is applicable to the case of this noble lady as to the case of any wife who might have been of sane mind all her life? It is true, the duchess was of non-sane mind and memory; it is true that the inquisition declares this affliction to have begun in 1782. But is a lunatic incapable of receiving monies paid? or, putting monies paid out of the case, is a wife, because she is a lunatic, incapable of receiving the benefits of the expenditure of money? May not money be expended for her? Might not the duke pay her milliner's bills? Might he not pay for the

ornaments of the person, decked in them to his credit and her own? Might not all this happen year after year just as much if she were lunatic as if she were of sound mind? The argument for the Respondent is this, you cannot presume satisfaction, because she cannot release a debt, being a lunatic; you cannot presume silence to be acquiescence, or an abandonment or waiver of her claim, because silence in a lunatic would not make that claim amount absolutely to any thing. I agree that, generally speaking, it does not: but there is another principle, there is another presumption to be taken into the account, which is applicable to the case; and that is the ground upon which the Court acts, in giving nothing beyond the year, or at most the year and fraction: the presumption is this, that the money has been paid, if not directly to the wife in money, yet received in bills paid by the husband, or incurred for necessities or ornaments for the use of the wife's person. Will any man contend that such a principle of decision does not apply to the case of a lunatic? Can it be doubted that a lunatic may receive payment by the discharge of her milliner's bills, and thereby satisfy a demand for pin-money? Pin-money is, in its nature, for the use and purpose of paying these milliners' bills; the only difference is, that the Duke of Norfolk, instead of paying over to his duchess money wherewith she might pay her milliner, paid her milliner, and saved her the trouble of transmitting the sum. The law, on this point at least, is as clear both in Equity, and in Lunacy, and at Common Law, as that a man's eldest legitimate son is his heir to freehold land. A lunatic cannot bind himself by bond, I admit; a lunatic

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cannot bind himself by bill; a lunatic cannot release a debt by specialty; a lunatic cannot be a conusor in a statute merchant, staple, a judgment, warrant of attorney, or any other security: but, that a lunatic cannot receive payment of a debt; that a lunatic cannot receive monies' worth, and thereby make himself, his executors, and administrators, that is, his assets, liable in discharge for what he has received, — I hear to-day, for the first time. I do not say that I hear it broadly stated, because the learned counsel are too good lawyers to state such a proposition directly, but I hear it assumed; I hear arguments built on the assumption, which, but for that assumption, crumble into pieces the moment you touch them. It is the foundation of the whole of those arguments. I constantly pressed the learned counsel to say what possibility there was of distinguishing the case of the duchess, being a lunatic, from that of any other wife, not being a lunatic, in respect of the presumption of payment of milliners' bills, and upon the position that the duke, the husband, was not bound to pay twice over the money provided for the payment of these bills, and I think I received not only no satisfactory answer, but no answer at all. I generally received an argument upon another part of the case in answer to those inquiries.

In the case of Lord Portsmouth*, a heavy bill was made the subject of an action by a coachmaker against his committee, for whom I was of counsel. The Earl was an undoubted lunatic; an inquisition, after much litigation, had been found; the jury had carried back their finding beyond the period of the coachmaker's bill, con-

* Bagster v. E. Portsmouth, 5 B. & C. 170.

sequently the production of that inquisition was *primâ facie* evidence of the lunacy. The jury found for the Plaintiff, under the direction of the Lord Chief Justice; and the Court afterwards refused to disturb the verdict, holding that the committee were bound to pay, notwithstanding the finding upon the inquisition. A case occurred a year after at York, to the same effect. There we set up a defence of lunacy, and Mr. Justice Bayley would hardly allow the objection to be raised. He said, "You cannot stultify yourselves in this way: Is a man of doubtful sanity to go about dealing with honest tradesmen, and to say afterwards he will set up his lunacy to avoid paying the bill? There is nothing extravagant in this bill: there was nothing to give the party notice that he was dealing with a mad-man; he got the goods delivered to him." A verdict was recovered, and the defendants never sought to set it aside.

The practice is the same in lunacy. Nothing is more common than for the Chancellor to confirm a Master's report, making allowances to A. B. for monies paid for the use of the lunatic; to C. D. for having maintained the lunatic; to E. F. for having clothed the lunatic. Upon what ground are all these allowances made? Not from kindness, not from charity, not for the convenience of the parties; but because they are debts; because in the eye of that court — be it a court of law, or a court of equity, or the Chancellor sitting in lunacy, — they are valid debts incurred by the unfortunate insane person, and are discharged by the justice of the Court. It is certainly done not for the interest of the lunatic, because that would be

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better consulted by rejecting the claim and by saying, "Why did you throw away your money or your care on an insane person, who had not the power of paying you or binding himself to pay you, and who could give or take no release for it?"

Now these cases can, upon no conceivable principle, be distinguished from the one I am now arguing: for they all show that the lunatic,—whose silence would be no consent; whose acquiescence would not be a waiver; whose obligation by a bond would not bind him; whose conusance of a judgment would not bind him to the conusee,—may nevertheless, by receiving the property of another, and using it for his own benefit, or, as in this case, receiving clothes, or the value in payment for millinery or repairs of articles of dress, can yet so far bind himself to the person who pays for the goods, as to enable him to set off the money so paid for the lunatic against a claim in *pari materia*, that is, against a claim of money, which was provided as the alternative of his not paying for the goods. The duke pays for the dress instead of paying the 1000*l.* a year; and the party being a lunatic is no more reason for refusing him the power to set off money so paid to the milliners, than if she were a person of sound mind, where *ex concessis* it is quite clear it would be set off. I feel no doubt whatever upon this point, and have no hesitation in pronouncing my opinion that as regards the judgment of the Vice-Chancellor, it cannot stand; that the case must at all events go back to the Master, with power to the personal representatives of his grace the late Duke of Norfolk to set off whatever may be proved to

have been properly paid by him in respect of the lunatic.

Upon the other question, Whether there is any claim at all upon the part of the representatives, I profess to have an inclination of opinion also favourable to the Appellant. I have stated generally the grounds upon which I distinguish pin-money from all other debts; upon these grounds, as at present advised, I incline to reject altogether this claim of pin-money by the personal representatives of the duchess against the duke's representatives, as inconsistent with the nature of the thing. But this part of the case is of the first impression. I have heard the arguments urged for the Respondent with very great ability by both the Solicitor-General and Mr. Stuart, who have done all possible justice to their clients; and I wish to be assisted by the reply of the learned counsel for the Appellant.

Before concluding these observations, and closing them with the proposition I am about to throw out to the parties, I shall add another observation which may illustrate the distinction between pin-money and other property of the wife. I have shewn the distinction between a claim of pin-money and debts claimed by a stranger creditor against a stranger debtor. But observe also the material difference between this case of pin-money in all its incidents as well as in its nature. Observe the different way in which the Court deals with it and with money settled to the separate use of the wife. I was surprised to hear it said that these cases are subject to the same rule as if they were pin-money; that the claim of the wife is confined to a year in the cases of separate

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estate. Can any body seriously maintain that as a proposition of law? Suppose I settle upon a wife, with no reference to pin-money, 1000*l.* a year, to her sole and separate use, her receipts only to be a discharge, and not mine; under her power alone to be recoverable, and exempted entirely from my control; and suppose that I vest this fund in trustees for that purpose, — can any one doubt that the wife, who had not received six years of that annuity, would have a right to recover the arrear? Can it be contended that the wife's claim would be confined to a single year? Clearly the trustees would be bound to see that the whole amount was paid to her. That is the difference between this provision and pin-money, which is confined to a year and a fraction. Why? Manifestly for the reason already given, and which grows out of the peculiar nature of pin-money, not only distinguishing it from all other debts, but distinguishing it from other separate estate of the wife.

These are the observations which I have now to throw out. I have spoken with distrust of my opinion upon one part of the case, and stated it as only the leaning of my opinion. But I expect to have more light furnished by the argument in reply. If I eventually entertain any doubt, I shall consult the noble and learned Lord who presided so long in the Court of Chancery. I have taken a full note of the argument and of the cases which have been cited, and I shall be able to refer him to the particulars.

I close these observations with a suggestion to the learned counsel for the Appellant, to consider whether they will be satisfied to take an immediate

reversal, with a remit to the Court below to send it back to the Master with instructions; or whether they will argue the case on the larger footing which I have now thrown out. If they are satisfied with the first proposition, there will be an end of the discussion.

Sir *Charles Wetherell* contended for the entire discharge, and was heard in reply on the 30th of June.

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*The Lord Chancellor.** — This is a case of great importance, deeply affecting every person in that high station, and possessing those large revenues which your Lordships enjoy, — I mean the question of pin-money; and consequently it was my duty to see that it should receive the most ample discussion; more especially as I felt that it was quite impossible for me, upon the best consideration I could give the case, to arrive at the same conclusions in all respects as that to which the Court below had come, and inasmuch also as this is a case, in many respects, novel, there being little or nothing of authority upon it in the books. It is wonderful, indeed, how little there is to be found upon the subject of pin-money, notwithstanding its occurring almost every time that a marriage takes place among persons of large fortune. You cannot even get a definition from the books upon which you can rely; you cannot trace the line which divides it from the separate property of the wife with any distinctness, or in a way on which you can depend; and as to authority either of decisions or *dicta* of text writers, or *obiter dicta* of judges, there is nothing that furnishes a clear and steady

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light on the subject: the cases running from pin-money into separate estate, and from separate estate into pin-money, in such a way, that when a text writer quotes a case, *Brodie v. Barry**, for instance, in support of a doctrine touching pin-money, you look at the book, and find it has nothing to do with pin-money, and does not support the proposition for which it is cited.

I remain of opinion that this decree cannot stand. The Duchess of Norfolk having been thirty-two years insane, and the Duke having, for the whole of that long period of time, not only paid the expence of her establishment with a munificence and liberality adequate to the station of so great an heiress, who became too, as his wife, the first lady in rank under the blood royal; but having also, beyond a doubt, paid all the personal expenses of her grace, for pocket-money, for trinkets, for millinery, in short, every thing on account of which pin-money is generally supposed to be provided—her executors, after her death, claim 32,000*l.* as arrears of pin-money, she having survived the duke five years, during which she had her ample jointure of 2000*l.* a year out of the duke's estate, beside her own private fortune of 11,000*l.* or 12,000*l.* a year—all, in consequence of the lunacy, accumulating. Her representatives proceeded, in the exercise of a duty which they could not, perhaps, avoid, as it was considered a question fit to raise by Lord Eldon, who suggested that the opinion of the Court should be taken upon it. To this demand the executors of the duke answer, You cannot both have the pin-money, and also have the duke to pay out of his own pocket

* 2 Ves. & B. 36.

for the very things to provide which pin-money was given. I also take leave to add, that a distinction on the subject of pin-money must be taken. There is no case in the books in which pin-money has been given, not even for one year, in any case to the representatives of the wife, for this obvious reason, from the nature of pin-money, because it was meant not for the sustentation of the wife, but for the dress and ornament of the wife in a station suitable to the degree of the husband. So that the Court gives the arrear to the wife of a year or a year and a quarter; because if it be not given to the wife, the husband is liable to pay her debt for necessaries according to her degree, and he advances the money to her in order that he may exonerate himself from payment for those necessaries. But if the wife dies, and her personal representatives make the claim (and this does not appear to have been considered in the Court below), the husband or his representative paying the arrear to the wife's personal representatives does not in the least exonerate the husband or his estate, because he or his representative is just as liable to pay for necessaries according to the husband's rank, as if he had not paid the amount to the personal representatives of the wife. I have, therefore, no doubt, whatever that you cannot allow the 32,000*l.* without an account. The decree below says they are to have the whole 32,000*l.* without any account; so that even if the duke had paid 2000*l.* a year for expenditure of the wife in the nature of pin-money expenses, not one farthing of that can be deducted. At all events, therefore, there must be an account in the Master's office, and credit allowed for pin-money

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expenses, in so far as the duke's representatives shall be able to prove, to the satisfaction of the Master, that he had paid those pin-money expenses.

There remain two other questions which I must crave time to consider further. On the first question, to which I have already spoken, I have no doubt; but on the other two my opinion is not so clear, especially on the third, Whether there can be any claim at all for pin-money? Whether there should be allowed a year, or a year and a fraction, to the executors, in respect of which year, or year and a fraction, the cases have allowed it to the wife herself? That is a point upon which, as there is no case or authority either way, I wish to have time for considering it. With this view I shall move your Lordships that the further consideration of the case be postponed; wishing only to state, that, if the decision below shall stand, and the doctrine be recognized that the wife may accumulate her pin-money while the husband pays her bills, and may then leave the accumulation to others, the sooner that doctrine is known the better; for I am quite sure, that instead of allowing 1200*l.* or 1500*l.* a year, or 1000*l.* a year, which was the case in this great family settlement, a much smaller, and a conditional allowance only, will in most instances be made.

11th July.

The Lord Chancellor.—This question turns upon a claim made by the personal representatives of her grace the late Duchess of Norfolk, for the arrears of her grace's pin-money, settled upon her at her marriage, by his grace the late Duke of Norfolk, which marriage was had some years pre-

vious to the unfortunate event that gave rise to the present proceedings, namely, her grace's aberration of mind, amounting nearly to a state of lunacy, which, however, in consequence of the care and attention she received from her noble husband, did not lead to the necessity of taking out a commission during his life, but which afterwards ended, upon his grace's death, in a commission being taken out in the year 1816, his grace having died in the year 1815, and her grace having survived the duke four or five years.

In the course of some proceedings which afterwards took place in the Court of Chancery, a suggestion was made which led to the filing of a bill by the duchess's representatives. This gave rise to his Honour's decision, that an account should be taken by the Master in the cause of the arrears due for pin-money from the year 1782 till the time of the death of his grace; and no further direction was given of any other account to be taken, or any credit to be given to the duke's estate for any monies that might have been paid in respect of those expenses to provide for which the pin-money was settled.

Very early in the argument of this case, I entertained an impression that this decree could not stand; that it was clearly erroneous to say that whatever had been paid by the duke was immaterial,—to hold that no payment was to be carried to the account,—that if the very money itself had been received by her grace during that time, it should not be taken into the account; and to say that no account should be taken of the pin-money expenses defrayed by the duke during those thirty-two years appeared manifestly erroneous also; for

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this was merely a reference to the Master to multiply 1000*l.* by 32, and to give the whole to the duchess's representatives.

This opinion was confirmed in the course of the argument, which left me with a very decided opinion, which I stated, for the convenience of the parties, in the hearing of the counsel on both sides; and I made a proposition to the learned counsel for the Appellant, that if they would be satisfied with a declaration, and remitting it to the Court below with that declaration, so as to take an account in the Master's office of the payments made for pin-money expenses, then, without calling upon them to reply to the elaborate and ingenious arguments upon the other side, I should have no hesitation in moving your Lordships to make such an order.

As, however, I had plainly indicated the leaning of my opinion upon the rest of the case, I was not surprised at the learned counsel preferring the other alternative, and going on with the reply. I then again went into the subject, and I was glad to have an opportunity of doing it in the presence of an unusually great number of your Lordships, greater than I almost ever saw at any judicial proceeding, from the accident of the case having been protracted to the hour of the day at which your Lordships usually sit for the ordinary business of the House. I have since held communication with a number of those noble persons whose opinions are entitled to great weight, and I find that my impression respecting the nature of pin-money is by no means confined to myself; that the view I had formed of it is the universally prevalent view among all who have considered the matter.

Upon a subject of this sort, where authority is so scanty that you hardly can find any *dictum* as to the purposes to which pin-money is devoted, I am far from thinking little of the general sense of your Lordships, who are the persons of all others most conversant with the nature and object of pin-money, and whose settlements are made with reference, in some degree at least, to the amount of pin-money. It is a very material fact, in a case where authority is so little to be had, that the general opinion of all those who give pin-money, either to their own wives, or to the wives of their sons, upon marriage, should be entirely coincident with the view to which the argument had led ; namely, that it is a sum allowed to save the trouble of a constant recurrence by the wife to the husband upon every occasion of a milliner's bill, upon every occasion of a jeweller's account coming in,—I mean not the jeweller's account for the jewels, because that is a very different question,—but I mean for the repair and the wear and tear of trinkets, and for pocket money, and things of that sort ; I do not of course mean the carriage, and the house, and the gardens, but the ordinary personal expenses. It is in order to avoid the necessity of a perpetual recurrence by the wife to the husband, that a sum of money is settled at the marriage, which is to be set apart to the use of the wife, for the purpose of bearing those personal expenses.

I stated the consequences of this doctrine, and that they appeared to exclude the claim, and left little or no doubt upon the question, save upon one part of it ; and that is, how far personal representatives were entitled to go back a year, or a year

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and a fraction. I stated the reasons why I considered in the first place that the nature of pin-money excluded the claim, by whomsoever made, for the by-gone thirty-two years; and that in the next place the nature of pin-money seemed also to exclude a claim by personal representatives *even for the small portion* of the period. I stated the reason why the proposition of exclusion, both as to the large and as to the lesser extent, seemed to follow from the nature of pin-money.

I took time to consider this: the result has been to confirm my opinion upon both the points; and I will shortly state the grounds. First, with respect to the whole period, — shall it be said that the money allotted to the wife is so allotted to her that she may consider it as a sum given her every year to do with as she pleases? that her grace of Norfolk, the first lady in England after the blood royal, who takes precedence of all the king's female subjects (while her husband is preceded by several from official rank); shall it be said that this great lady may dress herself like a peasant's wife, — may lay out 10*l.* by the year upon her own personal expenses, — may give no monies either in charity to the poor, or in *largesse* to her servants, her attendants, or her maidens? In former times, when pin-money was first introduced, the Duchess of Norfolk had ladies in waiting, esquires' wives and barons' daughters, just as the Queen of England has at this day. The less aristocratic habits of modern times have altered that; but pin-money was invented in days when the Duchess of Norfolk was more like a princess than a subject. Shall it be said, then, that this great lady is to give no *largesse* to any of her attendants or her servants —

that she may dress herself either so that she shall not be admitted at court, or so that she shall never appear at a county meeting, an assize, or a ball, or upon any of those occasions when the nobility of the country show themselves among their fellow subjects—that she may dress herself in such a manner that she shall not be able to show her face at those places of resort, or so that if she appears her noble consort shall be ashamed of seeing her there, and of avowing his connection with her—that she may in every respect spare every expense upon her person and hoard her pin-money,—that she has a right to do so, in neglect of the rank and in spite of the authority of her husband; and when her husband dies that she may claim, or when she dies that her representatives may claim, the whole arrears of this money, as if it had been set apart as an annuity, of which she has a right to the sole and separate use, and to the arrears of which she has just as good a right as her husband has to the residue of the estate upon which that annuity stands charged? Is that a tenable proposition? Because the principle of this decree cannot stop short of that proposition: they must either maintain that, or they are out of Court, and can maintain nothing.

I deny that such is the nature of this provision. It is meant for the wife's expenditure on her person—it is to meet her personal expenses, and to deck her person suitably to her husband's dignity, that is, suitably to the rank and station of his wife. It is a fund which she may be made to spend during the coverture by the intercession and advice, and at the instance of her husband. I will not go so far as to say, because it is not necessary for the

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purpose of this argument, that he might hold back her pin-money if she did not attire herself in a becoming way. I should not be afraid, however, of stretching the proposition to that extent; but I am not bound here to do so, because if during her coverture a claim were made by her (and this is one distinction between the claim of the wife and the claim of her personal representatives after her death), the absurd and incredible state of things that I have put, as the consequence of their argument,—the case of her attiring herself in an unbecoming manner,—never could happen if the pin-money is only to be claimed by herself; for in that case the duke would of course say, “If you do not dress as you ought to do, what occasion have you for pin-money?” He need not refuse, but he remonstrates; he uses that influence which the law supposes him legitimately to have over his wife, and sees that the fund is duly expended for its proper purpose.

Now the purpose is not the purpose of the wife alone; it is for the establishment; it is for the joint concern; it is for the maintenance of the common dignity; it is for the support of that family whose brightest ornament very probably is the wife; whose support and strength is the husband, but whose ornament is the wife. It is to support the dignity and splendour of the joint establishment, consisting of husband and wife, that part of the whole expenditure is for the support of the wife herself. Then does it not follow from thence that the husband has a direct interest in the expenditure of the pin-money? He has a right to have the pleasure of it, to have the credit of it, to be spared the eyesore of a wife appearing

as misbecomes his station — that is the destination and the object of pin-money.

Having stated the principle, I have now to shew its application to the two branches of this case; the one relating to the thirty-two years, and the other to the year, or the year and a quarter. I say it follows from the principle as to the first point, that if during the longer period the expenses of her person, and the demands upon her pocket for those things to which pocket money is applicable, have been defrayed by the husband; if he has not only kept, during her unfortunate illness, a separate establishment for her, providing for those expenses from which pin-money stands apart, — as house and garden, servants, carriage and horses, — but has also, during all that time, paid all the milliners' bills, all the wear and tear of trinkets, all the little expenses of pocket money, — then, I say, that even if she were alive, and came for an account, she could not have it both in the one way and in the other; she could not have it both in kind and in money; she could not have the bills paid for her, and the money paid to her which was originally settled upon her for the sole purpose of paying those bills. That I hold to be a perfectly clear proposition. Yet, no account whatever has been directed on that principle in the decree referring it to the Master to take an account; and it is not denied that those expenses were paid by the duke during the coverture.

In the next place, there is this material observation, which applies to both branches of the case, and, in my view, disposes of the whole. If she comes forward, and makes the claim during coverture, of course the husband takes care that

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the bills are paid, and he has an opportunity of controlling her; so that she shall not go and game, for example, with her pin-money, and leave him to pay her milliners' bills. But if the same claim, whether it be for thirty-two years or for twelve months, may be made by her personal representatives after her death, either upon the husband if he is living, or upon his representatives if he has pre-deceased her, then what follows? He is bound to pay the pin-money; and he is liable to the bills too, because the husband is liable to pay the bills of dressmakers, and other such persons, provided the articles furnished are of a kind suited to his station in life. That is the meaning which the law affixes to the term necessities; and nothing will relieve him from the claim of necessities, except a proof (and that only where the husband is living apart from the wife) that they are separated, that he has made an allowance adequate to her support, and, as the late cases in the King's Bench have determined, that he has actually paid the sum allowed for her separate maintenance; nothing short of this defeats the claim for necessary expenses. Therefore, the duke's representatives, or the duke himself, if he survived her, having paid the pin-money to her representatives, would be liable to pay the bills for which that pin-money was allotted.

Can it be contended that such is the law? Can it be contended that it is consistent with the nature of this provision? It might as well be said that pin-money means an annuity set apart, a separate sum set apart for the wife during the coverture, which she may use as she pleases, and come upon her husband for her personal expenses besides.

Such a proposition cannot be maintained in any consistency with principle, or deduced from any authority that can be referred to upon the subject.

Upon these grounds I have no doubt that the judgment is wrong. I have stated several others upon former occasions, and upon both those propositions every thing which I before said has appeared to me, upon further consideration, to be well founded. I have no hesitation, therefore, in recommending to your Lordships to reverse the decree of the Court below, after making one further observation. It is this,—that there is not only no one instance shewn, but nothing like an instance of pin-money having been allowed, except to the wife. It is one thing to allow it to the wife, it is another thing to allow it to the wife's representatives; and, should we affirm this decree, we should not only go the length of laying it down that pin-money is an unconditional provision, and that all that the husband may have paid for the wife cannot be set off against the claim, whether the claim be made during the wife's lifetime or after her decease by her representatives; but we should be affirming another proposition for the first time: we should be making a precedent, the first that can be shown to exist, of a claim of pin-money to any extent whatever allowed to the wife's personal representatives after the wife's death; and I am not prepared to advise your Lordships to make any such precedent. It would be going further than any case has yet gone; it would be contrary to every principle of the law generally, and to the whole spirit of the law upon this subject.

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Decree reversed.

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IRELAND.

(COURT OF EXCHEQUER.)

WILLIAM BROWN - - - *Appellant* ;WILLIAM F. FOWNES TIGHE and } *Respondents.*
DANIEL TIGHE - - - }

T., by indenture dated in 1663, demised to W. lands, &c. in Ireland, together with the mines, timber, &c. to make sale, &c. thereof, without impeachment of waste, the lessee, his executors, &c. planting, from time to time, 500 trees of oak and ash in the room, &c. during the lease, to hold, &c. for a term of ninety-eight years, at a rent of 15*l.* sterling for the first three years, and 30*l.* sterling for the remainder of the term : and T. covenanted that he, &c., upon request, would “ from time to time renew the said lease and perfect such “ other further assurances as W., &c. should require, &c.” The lease also contained a covenant of warranty of title, &c., and that in case of eviction, or that the premises should be wasted in war or rebellion, &c. that the rent should cease for the time.

By an indenture dated in 1739, reciting the original lease and the covenant for renewal, a further lease for ninety-eight years, recited to be in pursuance of the covenant, &c., was granted, containing a similar covenant.

Upon bill filed in 1827, claiming a further renewal, held that the covenant was to be construed as a covenant for further assurance, and not for perpetual renewal.

RICHARD TIGHE, by indenture of lease, bearing date the 3d of July 1663, demised, granted, set, and to farm let to William Wright, all that and those the town and lands of Ballireadman situate in the county of Carlow, in Ireland, and then in the

possession and occupation of the said William Wright, and his assigns, containing 223 acres profitable land, of then Irish measure, more or less, as the same had been set out to the said Richard Tighe, with all other lands returned as unprofitable or waste, whether woods or underwoods, bogs, or barren mountain, as part thereof, or any way to the said Ballireadman, theretofore belonging, together with all warrens, waters, ways, easements, mills, wares, houses, orchards, gardens, quarries of stone, slate, mines of coal, lead, tin, brass, iron, copper, or any other mines or minerals, that were in the disposal of the said alderman Richard Tighe, fishings, fowlings, profits, benefits, and advantages, and also the timber then growing or lying on the said lands, and to make sale and disposal thereof, as he or his executors, administrators, or assigns, should think fit, to his and their own proper use and advantage, without impeachment of or for any waste, *they planting 500 trees of oak or ash in the room of them*, and also performing the same from time to time during the said lease; to have and to hold all and singular the said premises with the appurtenances, without impeachment of waste, as aforesaid, unto the said William Wright, his executors, administrators, and assigns, for and during the term of ninety-eight years, from the 29th of September then next ensuing, fully to be complete and ended, at and under the yearly rent of 15*l.* sterling of the then currency of England, for the first three years of the said lease, and the yearly rent of 30*l.* sterling of the like currency, during the remainder of the said term of ninety-eight years, payable half yearly, with one sugar

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loaf on the 1st of January yearly ; with a covenant for distress and re-entry, in case of non-payment of said reserved rent.

By the said indenture of lease the said alderman Richard Tighe did further covenant and grant to and with the said William Wright, his executors, administrators, and assigns, that it should be lawful for the said William Wright, his executors, administrators and assigns, to cut and dispose of all the aforesaid woods as aforesaid, and to search, dig, and find out any quarries of stone and slate, or any other mines of coal, lead, tin, iron, brass, copper, or any other kinds of minerals whatsoever, in the disposal of the said alderman Richard Tighe as aforesaid ; and the same, so sought and found out, to have, use, sell, and dispose of, at the will and pleasure of the said William Wright, his executors, administrators, and assigns, for his and their only proper use and benefit, if any should be found.

Richard Tighe for himself, his heirs and assigns, further covenanted, promised, and granted to and with the said William Wright, his executors, administrators, and assigns, that he the said alderman Richard Tighe, his heirs and assigns, should and would, upon request unto him or them to be made by the said William Wright, his executors, administrators, and assigns, from time to time renew the said lease, and perfect such other further assurances as he, the said William Wright, his executors, administrators, and assigns, should reasonably, with their counsel learned in the law devise, advise, or require, for the better strengthening, confirming, and sure making of all and singular the said demised and granted premises,

and every part thereof, unto the said William Wright, his executors, administrators, and assigns, at such rents, and under such covenants and conditions as contained in the said indenture of lease, at the charge of the said William Wright, his executors, administrators, and assigns.

Richard Tighe, for himself, his heirs, and assigns, by the said indenture of lease, further covenanted, promised, and granted to and with the said William Wright, his executors, administrators, and assigns, that he, the said alderman Richard Tighe, his heirs and assigns, should from time to time, and at all times thereafter, pay all quit-rents, and other rents already due, or thereafter to be due, upon or out of the said demised premises, or any part thereof, unto the king, his heirs, and lawful successors, or to any other person or persons whatsoever, or any other charge assessed, taxed, or levied on the rent, or in lieu of the said quit-rent; and if in case the said William Wright, his executors, administrators, or assigns, or any of them, or any of their under-tenants, should be forced to pay the said quit-rents, or other rents or tax, or other charge taxed or to be taxed upon the rent, or in lieu of the said rent, that then so much of the said yearly rent be abated and allowed, and the said William Wright, his executors, administrators, and assigns, should and might detain so much of the said rent, on the next day of payment, according to the said lease; and the lease contained a covenant of warranty of title against all persons claiming by, from, or under alderman Richard Tighe; and that in case of any eviction, or that the premises should be wasted, destroyed, or decayed, by any war or rebellion, so that the tenants could

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not possess the same, with safety to their lives or goods, that then, for so long, the said rent should cease and be abated.

By virtue of the lease, the lessee, William Wright, continued in the occupation of the demised premises. Afterwards, the lessor, alderman Richard Tighe, died intestate, seised of the reversion and rent of the lands; and upon his death William Tighe, grandson and heir of Richard Tighe, became seised of the reversion and rent. All the estate and interest of William Wright, by virtue of the recited lease of the 3d of July, 1663, became, by assignment thereof, duly vested in Denny Cuffe, of Sandhill, in the county of Carlow, who became possessed of the premises by virtue of the assignment.

By indenture bearing date the 7th of March, 1739, made between the said William Tighe, of the one part, and the said Denny Cuffe, of the other part, after reciting the original lease of the 3d of July, 1663, and also the covenant for renewal therein contained, William Tighe, at the request and desire of Denny Cuffe, and in pursuance of the covenant or clause of renewal contained in the recited lease of the 3d of July, 1663, and for and in consideration of the rents, covenants, and conditions therein contained, thereby demised, granted, set, and to farm let, unto the said Denny Cuffe, his executors, administrators, and assigns, the aforesaid town lands and premises, without impeachment of waste, to have and to hold all and singular the said premises, with their appurtenances, unto the said Denny Cuffe, his executors, administrators, and assigns, for and during the term of ninety-eight years, from the 29th of September then last past,

fully to be completed and ended,—yielding and paying therefore unto the said William Tighe, his heirs and assigns, the yearly rent or sum of 30*l*. and one sugar-loaf, on the 1st of January yearly, over and above all contributions, and other charges whatsoever; and the indenture contained all the same clauses, provisions, and covenants as in the original lease, and, amongst others, a covenant for renewal in the same words as are contained in the original lease.

Denny Cuffe died possessed of the demised premises, under and by virtue of the aforesaid assignment and indenture of renewal; and upon his death Sir Jonah Wheeler Denny Cuffe, baronet, son and executor of the last will and testament of the said Denny Cuffe, became entitled to the premises, and entered into possession thereof.

Sir John Wheeler Denny Cuffe, baronet, by indenture of assignment, bearing date the 23d of January, 1812, after reciting the renewal of the 7th of March, 1739, and also reciting the covenants for renewal in the deeds contained, in consideration of the sum of 10,000*l*., duly assigned and conveyed all the aforesaid premises, and all his estate, title, and interest therein, as executor, under and by virtue of the said several indentures, to Robert Browne, father of the Appellant.

By virtue of the assignment and conveyance, Robert Browne became entitled to the several lands and premises, and entered into possession thereof, and paid the yearly rent; and continued so possessed until the time of his death; and being so entitled and possessed, died sometime in the month of January, 1816, having on the 14th of March, 1814, made and published his last will and testa-

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ment in writing, and thereby devised all the rest and residue of his real and personal estate, which included all and singular the aforesaid lands and premises of Ballireadman, and all his estate and interest therein to the Appellant, his eldest son, his executors, administrators, and assigns, and thereby appointed the Appellant, and Redmond Browne, a younger son, his executors. After the death of Robert Browne, his will was proved in the Ecclesiastical Court in Dublin, and probate thereof was granted to the Appellant, who by virtue thereof, and being so entitled, entered into possession of the lands and premises, and paid the reserved rent, and performed the covenants contained in the lease.

William Frederick Fownes Tighe (one of the Respondents) became seised of the rent and reversion of the demised lands and premises, and was heir-at-law of William Tighe, party to the indenture of the 7th of March, 1739, and also heir-at-law of Alderman Richard Tighe, party to the indenture of the 3d of July, 1663, and for several *years* received from the Appellant the reserved yearly rent, payable out of the lands.

The Respondent, William Frederick Fownes Tighe, intermarried with the Lady Louisa Madelina Lennox, and on that occasion a marriage settlement was executed, bearing date the 16th of April, 1825, whereby, among other matters, the lands and premises were conveyed by William Frederick Fownes Tighe to his Grace Charles, Duke of Richmond, and Daniel Tighe, of Rosanna, in the county of Wicklow (one of the Respondents), and to their heirs and assigns, as trustees upon several trusts therein limited and expressed.

The last-mentioned lease being within a few years of expiration, the Appellant applied to William Frederick Fownes Tighe, to make a further demise to the Appellant of the same by way of renewal thereof; and for such purpose the Appellant caused a draft of such renewal or new lease, containing the same covenants and clauses as contained in the original lease of the 3d of July, 1663, to be tendered to William Frederick Fownes Tighe, on the 15th of March, 1827, and such draft was left for the purpose with the land agent of William Frederick Fownes Tighe. The Appellant afterwards made repeated applications to the Respondent, William Frederick Fownes Tighe, to execute such new lease or renewal; but he declined to execute such renewal, or any renewal, or any further demise, of the premises, and altogether denied the right of the Appellant to any further demise of the same, under or by virtue of the indentures of the 3d of July, 1663, and 7th of March, 1739.

At the time when the draft of renewal was tendered to William Frederick Fownes Tighe, in manner aforesaid, the lessee's part of the original lease of the 3d of July, 1663, could not be found, and it was supposed it was lost or destroyed.

The Appellant, on the 7th of November, 1827, exhibited his original bill in the equity side of his Majesty's Court of Exchequer in Ireland, against the said William Frederick Fownes Tighe, Daniel Tighe, and his Grace Charles, Duke of Richmond, trustees named in the marriage settlement of William Frederick Fownes Tighe. By the bill the Appellant stated the several matters herein-before mentioned, and prayed, that it might be declared that the Appellant was entitled to a renewal or new

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demise of the premises, for the like term, and subject to the same rents and covenants as contained in the indentures of the 3d of July, 1663, and the 7th of March, 1739, and that the covenant contained in the original lease was a covenant for the perpetual renewal thereof, and that William Frederick Fownes Tighe, and such other of the confederates as the Court might think proper, might be decreed to execute a renewal to the Appellant of the original lease, and that specific performances of the covenant of renewal might be decreed to the Appellant.

The Respondent, William Frederick Fownes Tighe, filed his answer to the bill on the 20th of February, 1828, and thereby admitted the seisin in fee of Richard Tighe, the indentures of the 3d of July, 1663, and the 7th of March, 1739, and continued possession thereunder, and the payment of the yearly rent by Robert Browne, and also the payment of rent by the Appellant, to him the said William Frederick Fownes Tighe, ever since the death of Robert Browne; and also that he, the said William Frederick Fownes Tighe, was seised from the year 1816 of the reversion and rent of the said premises, as *devisee* of his father, William Tighe, who had been seised in fee thereof, and was grandson of the said William Tighe, party to said indenture of the 7th of March, 1739, and admitted the tender of such draft of renewal, but denied that the said covenant contained in the said original lease of the 3d of July, 1663, was a covenant for perpetual renewal, and insisted that the same only bound the lessor and his heirs to execute such further assurance, as should be reasonably required for the purpose of confirming the said lands and

premises unto the said William Wright, his executors, administrators, and assigns, for and during the term of ninety-eight years, in the indenture of the 3d of July, 1663, mentioned; and that the said covenant was introduced into the indenture in consequence of the imperfect title which he alleged the said Richard Tighe then had to the lands.

That one Daniel Hutchinson, of the city of Dublin, alderman, and the said Richard Tighe, were, before the date of the said indenture of the 3d of July, 1663, possessed of the said lands, and several other lands, which were set out for the satisfaction of several debts due to them, and those under whom they claimed, for provisions furnished by them for the supply of his Majesty's Army in Ireland in the year 1641, or had some other ground of claim to the said lands and premises under the act of settlement and explanation, and that the said Daniel Hutchinson and Richard Tighe being desirous to secure unto themselves the said lands and premises through the influence of Colonel Thomas Piggot, entered into an agreement with the said Thomas Piggot, in consequence of which the claim to the said lands was entered before the commissioners for executing the acts of settlement and explanation in the name of the said Thomas Piggot, but in trust for the said Daniel Hutchinson and Richard Tighe; and by the certificate and decree of the commissioners for executing the said acts of settlement and explanation, dated the 17th of August, 1666, the said lands of Ballireadman were, with others, decreed unto the said Thomas Piggot, his heirs and assigns for ever; and it was by the said certificate set forth, that the said Thomas Piggot, or those under

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whom he claimed, their lessees or undertenants, were on the 7th of May, 1659, in the actual seisin, possession, and occupation of the said lands; and that in pursuance of the said decree, on the 15th of January, 1666, the said lands of Ballireadman, with others, were granted, by letters patent under the Great Seal of Ireland, unto the said Thomas Piggot, his heirs and assigns for ever.

That the said Thomas Piggot having refused to execute a conveyance of the said lands to the said Daniel Hutchinson and Richard Tighe, according to the trust reposed in him, they, on or about the 25th of June, 1667, exhibited their bill of complaint in the High Court of Chancery in Ireland, against the said Thomas Piggot and his wife, and one Alexander Piggot, praying, amongst other things, a declaration of trust and conveyance of the said lands to the said Daniel Hutchinson and Richard Tighe; and that by a decree of the Court of Chancery made in the said cause, bearing date on or about the 8th of February, 1669, it was ordered, that the said Thomas Piggot and Alexander Piggot should convey unto the said Daniel Hutchinson and Richard Tighe, and their heirs, all their right, title, and interest in and to all and singular the premises, and every part thereof.

And that in pursuance of the said decree, and for the other considerations therein mentioned, the said Thomas Piggot and Alexander Piggot, by indenture bearing date on or about the 12th of September, 1670, did grant, release, and confirm unto the said Daniel Hutchinson and Richard Tighe, the said lands of Ballireadman, with several others, to hold unto the said Daniel Hutchinson and Richard Tighe, their heirs and assigns for ever.

That the said Daniel Hutchinson and Richard Tighe, for the purpose of making a partition, by indenture, bearing date on the 26th day of October, 1670, released and confirmed unto John Price and William Martin the said lands of Ballireadman, with several others, to hold unto the said John Price and William Martin, their heirs and assigns for ever, to the uses therein mentioned, that is to say, concerning the said lands of Ballireadman, with other lands, to the use of the said Richard Tighe, his heirs and assigns for ever, to be held of his Majesty under the like services and proportionable quit-rent, as were reserved and payable for the same by the letters patent.

The Respondent, William Frederick Fownes Tighe, in his answer, farther submitted, that it appeared by the several matters and documents aforesaid, that although Richard Tighe was in possession of the lands of Ballireadman, at the time of the execution of the indenture of the 3d day of July, 1663, yet he was not then seised of any legal title in the lands enabling him to make such demise, but had merely a claim thereto under the acts of settlement and explanation, and that he did not acquire a perfect title until the year 1670; and further submitted, that the state of the title or claim of Richard Tighe accounted for and explained the intention of the parties in introducing into the indenture of the 3d day of July, 1663, a clause or covenant for further assurance.

By his answer he further stated, that Richard Tighe died in the year 1673, but not intestate, as in bill stated, and that he believed Richard Tighe, in the year 1673, executed some deed, whereby he made, or covenanted to make himself tenant for life,

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with remainder to William Tighe, his only son, for life, with remainder to the first and other sons of William Tighe, in tail male, and that upon the death of Richard Tighe, William Tighe, his said only son and heir-at-law, became seised for life of the lands, and that William Tighe, having afterwards died, leaving Richard Tighe, his only son, the said last-mentioned Richard Tighe thereupon became seised of the lands as tenant in tail, under the deed executed by his grandfather, Richard Tighe, as aforesaid.

That Richard Tighe, the grandson, being so seised of the lands in Easter Term, 1699, levied a fine and suffered a recovery thereof, whereby he became seised in fee of the lands, and being so seised, he died in the year 1736, having made his last will and testament in writing, bearing date the 1st day of May, 1735, attested as by law required, for devising real estates, and thereby devised all his lands, in the county of Carlow, including the lands of Ballireadman, unto his son, William Tighe, for and during the term of his natural life, with remainder to the said William's first and other sons, in tail male, that Richard Tighe, the testator, soon afterwards died, and that William Tighe, who was the great grandson of Richard Tighe, the lessor in the lease of the 3d day of July, 1663, upon the death of Richard Tighe, the testator, became, and was seised of an estate for life only, under the will, and that the last-mentioned William Tighe was the lessor in the indenture of the 7th of March, 1739.

The Respondent, William Frederick Fownes Tighe, by his answer, also admitted that the Appellant had regularly paid the reserved yearly rent, and that, for the reasons therein-before stated, he

had declined to execute any renewal or any further demise of the premises.

The Respondent, Daniel Tighe, also filed his answer to the bill on the 13th day of February, 1828, and thereby admitted that the Defendant, William Frederick Fownes Tighe, in the year 1825, intermarried with the lady Louisa Madelina Lennox, and that on the said occasion a marriage settlement was executed, bearing date the 16th of April, 1825, whereby the lands in the bill mentioned, amongst others, were conveyed by William Frederick Fownes Tighe, to Charles, Duke of Richmond, and the Respondent, Daniel Tighe, and unto their heirs and assigns, as trustees upon the several trusts therein limited.

The other trustee, the Duke of Richmond, being resident out of the jurisdiction of his Majesty's Court of Exchequer in Ireland, did not answer the bill.

After these proceedings were had, and before issue was joined, the lessee's part of the original lease of the 3d day of July, 1663, having been found, it became necessary for the Appellant to file a supplemental bill, to put in issue in the cause, the original lease of the 3d day of July, 1663, and such bill was filed on the 2d day of February, 1829, and the Respondent's having answered the same issue, was joined in the cause, and witnesses were examined on both sides.

The evidence on the part of the Appellant, went to prove the several deeds of the 3d of July, 1663, the 7th of March, 1739, and the 23d of January, 1812; and the evidence on the part of the Respondent, William Frederick Fownes Tighe, went to prove the transactions stated in his answer,

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which took place between alderman Richard Tighe, and Colonel Thomas Piggot, and also to prove that William Tighe, who granted the renewal of the 7th of March, 1739, was tenant for life.

The cause was heard on the 11th of November, 1830, and subsequently on the 19th of November, 1830, and 14th of February, 1831; on the 15th day of February, 1831, the Court ordered and decreed, that the Appellant's bill should be dismissed, but without costs.

The appeal was against this decree.

For the Appellant,—Mr. *Pemberton*, and Mr. *Jacob*.

For the Respondents,—Mr. *Knight*, and Mr. *J. Jervis*.

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The Lord Chancellor.—This case is one of considerable importance, as a question of construction, upon which, for any thing I know, other questions of a similar nature may be raised between parties. For this reason, and out of respect for the great doubts expressed by the Judges who delivered their opinion and decided in favour of the Respondent, I suggest to your Lordships the propriety of allowing it to stand over for a short time, that I may have an opportunity of further considering the authorities. At the same time I should not do what may be both convenient and fair to the parties, if I was not, in the presence of the learned counsel, to state, generally, the impression made upon my mind by the consideration of the arguments which have been urged, and of the cases to which we have been referred, and of some others which I have looked at, to which the learned

counsel did not, perhaps, feel it, on either side, for the interest of their several clients to advert.

That a covenant to receive the construction of perpetual renewal must be plain and distinct, and such as to bear no other construction, without force and violence done to the words and to the context, is a proposition of law which is both borne out by principle, and is sustained by decided cases. At one time, so strong was the leaning of the Court of Chancery in this country against such covenants, that it expressed a determination not to decree a specific performance, merely because it was a covenant of perpetual renewal: and Lord Thurlow, in a case which I have not been able to find, is supposed to have gone nearly as far. That this went too far in that direction, has since been again and again admitted. It was stated by Lord Eldon as being so disapproved of by the Court in the case of *Willan v. Willan**, and in other cases. This opinion was modified by Lord Thurlow himself on a subsequent occasion. At all events, the case of *Tritton v. Footet*†, though it does not in words refer to the other case, nevertheless clearly shews that Lord Thurlow did not then hold it to be a covenant of which the specific performance could not be decreed. He said his present inclination was to dismiss the bill. Now, there was a covenant, “at the end and determination of the said term, to execute a new lease of the said demised premises for the further term of seven years, to commence from the same term, subject to the same rents, covenants, reservations, conditions, and agreements, in all respects as are in

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* 16 Ves. 84.; and see *Somerville v. Chapman*, 1 B. C. C. 61.

† 2 B. C. C. 698.

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“ the first term.” If you take these words literally, what do they amount to? Plainly to this, and nothing else;—a lease for twenty-one years, with a covenant, at the determination of that lease, namely, at the expiration of the twenty-one years, to renew it for seven years, with the same covenants in all respects; and as one of these covenants is a covenant at the end of that twenty-one years to add seven years more, it is clear, at the end of the twenty-eight years there would be a covenant to renew it for seven years more after that; so that, if you take the words in their literal sense, it is really nothing more or less than a lease for twenty-one years, with a covenant in perpetuity to add seven years to the current lease. It is not merely a covenant to add seven years to the first twenty-one; that would be only a lease for twenty-eight years, namely, a lease executed for twenty-one years, and executory for seven years beyond that term; but it is an agreement, by means of the executory covenant, to execute upon the determination of the twenty-one years, a new lease for seven, with the same covenants as in the existing lease, that is to say, among other covenants, one for renewal at the end of the term of seven years. That, therefore, was a very strong case for perpetual renewal upon the construction of the words taken literally; however, the Lord Chancellor said, his present inclination was to dismiss the bill, but upon Mr. Mansfield suggesting that if he did so the Plaintiff would not have his lease for seven years, his Lordship declared him entitled to a lease for seven years only, and said he had not an idea the intention of the lessor was to renew the covenants of renewal, or that they could be so construed

in a court of equity. I take this to be a proof that Lord Thurlow did not stand, in *Tritton v. Foote*, upon the high ground on which he had stood in the former case; because, if so, he would have said, 'I will not even look to the intention of the lessor; I will on no account decree the specific performance of a covenant for perpetual renewal;' as he is supposed to have said in that former case. We may take the law, therefore, to be settled as I originally stated, that if it clearly appears that a covenant for perpetual renewal was the intention of the party, a court of equity is bound to perform that specifically as it would a covenant for a seven years' lease, but that the intention must appear distinctly; and that taking into consideration the context, and the whole circumstances of the case, if you gather such a clear and distinct intention, you are bound specifically to perform it. At law it would be the same; an action would be maintainable upon the same principle of construction; and damages would be awarded for not performing the agreement by renewing the lease, that is, for not executing the covenant. The whole instrument would be examined, and if it were found to impart a clear obligation for perpetual renewal, an action would lie. Nor is there any thing in *Cooke v. Booth** at all to contradict this proposition.

Such being the principle to be collected from the authorities, negating what was, in the earlier case, considered to be the law, your Lordships will find it sustained by the cases which deciding that to create an obligation of perpetual renewal, there must be distinct and clear words, and that nothing

* Cowper. 819.

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is to be supplied by intendment; yet allow that you are not rigorously to take the words in one particular branch of the covenant, without looking to the context and the whole instrument. That is quite plain from the cases to which reference has been made more than once in the course of the argument, and particularly that of *Baynham v. Guy's Hospital**, a decision of Lord Alvanley's, who argued the case of *Cooke v. Booth*, in the King's Bench, and who refers to that argument in his judgment. The case of *Moore v. Foley*† undoubtedly contains nothing contrary to the principle, but affirms it as much as the earlier case of *Baynham v. Guy's Hospital*. But in *Moore v. Foley*, Lord Hardwicke is supposed, in his argument in the case of *Furnival v. Crew*‡, to have given reasons, and a construction founded upon words which are inaccurately stated, and the inaccuracy is important. From what was stated by Lord Hardwicke, and from what appears on the face of the lease itself, the discrepancy is very material, with a view to the present case, inasmuch as those words which Lord Hardwicke is supposed to have relied on, are the words contained in this lease; and consequently, if it were admitted either that Lord Hardwicke had relied on those words as importing perpetual renewal, or that Sir William Grant, in *Moore v. Foley*, held those words, upon a due consideration of the decided cases, to be of the same import, it would have been more difficult to agree with the decision pronounced in the present case by the Court below in Ireland. Sir William Grant is made to say, in *Moore v. Foley*, "The words are not, in this case, 'from

* 3 Ves. 295. † 6 Ves. 232. ‡ 3 Atk. 83.

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“ ‘time to time,’ as in *Furnival v. Crew*, upon which words Lord Hardwicke laid great stress, as amounting to an obligation to fill up lives upon the dropping at any time.” Let us now look to 3d *Atkins*, 83., to which his Honor there refers, or is made by the report to refer, and you will find the reference is inaccurate. That report appears to be a full and accurate one, and assuredly a very able judgment it is. Lord Hardwicke says, “Then come the following words*, ‘and so to continue’ ‘the renewing of such lease or leases to Thomas Moore, or his assigns, paying as aforesaid;’” not the words “from time to time,” upon which he makes no comment, and which do not come into this part of the passage. Then follows his construction of those words, “so to continue.” “It has been argued for the Defendant,” says he, “that these words mean only to continue the lease by adding a new life on the death of the first lessee, but I am of opinion that those words do not mean barely continuing a new life, but continuing the filling up the estate from time to time.” Lord H., therefore, does not lay the stress upon the words “from time to time,” as the report, makes his Honor state him to have done. Lord Hardwicke says, “The words are, ‘so to continue;’ and the inference I draw from these words, the meaning I give to these words, the conclusion and argument I build on these words, is, that the party using them meant to bind himself and his successors ‘to continue from time to time:’” but the words are not “from time to time,” and it does not at all follow that Lord Hardwicke would have said, if the words had been

* Sec fo. 85.

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“from time to time” in the lease, without the words “so to continue,” therefore they would have raised the same inference; it is possible he might, but it does not follow as a necessary consequence. When you look at the words of the lease itself, you find what has probably led to the mistake; there are in the lease the words “from time to time,” but they are not properly part of the obligation to renew. It is not that A. B., his heirs, &c., shall, from time to time, renew, or continue from time to time to renew, but that the lessees on obtaining a renewal shall, from time to time, perform something on their part. The words are, “shall execute one or more lease or leases from time to time, under the same rents and covenants, and so continue the renewal of such lease or leases to Thomas Moore, or his assigns, paying as aforesaid to John Crew, his heirs or assigns, 68*l*. for every life so added or renewed from time to time.” Therefore, it is not that he covenants to renew from time to time, but that he covenants to renew and continue renewing; and those are the words on which Lord Hardwicke rested his judgment, “to continue renewing to certain lessees, and their assigns, from time to time, so long as they paid the rent;” he was not bound to continue it to those who did not pay the rent. As often as he renewed, so often they were bound to continue to pay the rent; and if they did not continue to pay the rent, he was not bound to renew.

I am therefore, as at present advised, inclined to think that the authorities are in favour of the proposition with which I set out, and that the applica-

tion of these authorities to the present case bears out the construction put by the Irish Court.

It is to be observed that you have not the word "continuing;" though you have the words "from time to time." I will not say that a covenant to renew from "time to time," without more, might not import perpetual renewal. It is clear that if the Court below was not called upon to decide that point, neither are your Lordships. But I will take the words "from time to time" to have been, in the case of *Furnival v. Crew*,—I will take them to have been an obligation in that case on the part of the lessor and not on the lessee; I will take that case to have been accurately referred to in *Moore v. Foley*, and Sir William Grant's judgment to have been borne out by the authority of Lord Hardwicke's decision, as he supposed it to be; I will even admit that the lease to continue renewing from time to time as it should expire, or the word "renewing," without more, would mean perpetual renewal. We have no reason, in supporting this judgment, to quarrel with or decide against those propositions. They may stand perfectly well with the judgment of the Court below, and the affirmation of that judgment, because there are circumstances in this case totally different from that which I have now put, and those circumstances I shall now shortly advert to.

First of all, the impartibility, of which I have said so much in the course of the argument that it is needless to add more. The constant renewals that take place in Ireland, and the holdings constituted there, as in Manchester, Cheshire, and other parts of this country, are all in the nature of sales: in some parts of the north, the consideration

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is called *Grassum*, in other parts it is called the purchase-money, though a rent is reserved in perpetuity; but in Ireland, where the same thing is done in most of the present holdings of that kind, it is by way of perpetual renewal: a sum of money being paid at first, and a rent reserved small in proportion as that sum is great, and greater if the sum is small. Secondly, when did any one ever see a covenant for perpetual renewal introduced into the body, as it were, of a covenant for further assurance? Every body knows what the office is of a covenant for further assurance of title: did any one ever think of inserting, in a conveyance, a covenant for perpetual renewal, in the very middle of a covenant for further assurance? Then, thirdly, let us consider that there is a covenant on the part of the lessee, that he and those succeeding him in the premises should always keep up 500 oak and ash timber trees, as often as any of those should be cut down or destroyed, or go to decay. Is it not a marvellous thing, that the lessor, whose only interest in a perpetual lease is, that he should receive the rent and render, should take the trouble of providing that his lessee should have a well wooded estate? If I am going to let an estate for fifty years, it is very material I should see it kept well wooded, that I may have at the end as much good ash and oak timber as I had at the commencement of the lease; but if I let it for 1000 years, or to the end of time, as these lessees would say it is, what good is it to me, that those with whom I have no common interest should have a well wooded estate of ash and oak trees? It is perfectly irrational, except upon this one supposition — that it may be contended that in case the

lessee throws up his lease or forfeits it, by non-payment of rent or non-performance of covenants, and the lessor, upon a re-entry for covenants broken or in any other way, takes possession of his land, he then should find it in a well wooded state: it is just possible to put that construction upon it, though I cannot help thinking, if they contemplated a perpetual renewal, that that was not a contingency they were likely to have in contemplation, more especially as no other contingency, such as the repairs, was at all provided for.

Now, last of all comes the word "further." A party is the best interpreter, it has been said, of his own words; and when the question is, whether we are to construe a given covenant to be for perpetual renewal or further assurance, what better criterion can we have, or what safer guide to follow, than the very words which the man who makes the covenant has given us? And when we find him saying, "mind I mean this a covenant for further assurance," is not that a reason to believe that he meant it so? Nothing can more strongly indicate in what sense he regarded the covenant, than using the words "other further assurance?" They are so strong as with difficulty to be got over; I may say they are hardly in any way to be removed.

Upon these several grounds, upon reference to the authorities, I am, as at present advised, inclined to think there is not so much doubt and not such great difficulties in this case, as the report with which I have been furnished of the learned Judges' opinion in the Court below appears to ascribe to it; nevertheless, I feel myself bound to think there may be some considerations that may have escaped

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me, not having sufficiently investigated the case; and as this may be material to the question of costs, I feel disposed to ask time for further consideration.

The Lord Chancellor. — This case arises upon the construction of a lease of ancient date, granted on the 3d of July, 1663; and the question simply is, whether a covenant in that lease and the counterpart (the words “further assurance” being in one, and not in the other) contains or imposes an obligation of perpetual renewal, or is only a covenant for further assurance? I stated the case when it was before your Lordships, and entered at length into the argument on both sides. I intimated at that time, that I myself upon the argument entertained no doubt that the decision of the Court below was a sound one; holding the covenant to be for further assurance. On account of the importance of the question, I took time to consider, and the result of that consideration is to confirm my first opinion, and to induce me now to move your Lordships to affirm the judgment. I shall not enter at length into the argument now. First, because I move your Lordships to affirm, and not to reverse or alter in any way, the judgment pronounced by the Court below; and secondly, because I formerly stated at length the grounds of my coincidence of opinion with the Court below. The words are, “shall and will on request to him or them, to be made by the said William Wright, his executors, administrators, and assigns, from time to time renew the said lease.”

Now I agree that if that had stood alone, there would have been good ground for saying that the word “renew” is not a word *per se* sounding in

further assurance. But we are to look to the context; first of all, to that which is parcel of the covenant; next, to the other covenants; and if we find reason to believe from the whole that such is the meaning, we are bound to give that meaning to the word "renew." Now: first of all, in what part of the lease are the words to be found? If conveyancers in the seventeenth century, as those in the eighteenth and nineteenth have usually done, had a particular part of the deed in which they made an enumeration, and set forth the covenants for further assurance, it is something—I don't say it is decisive that you find this expression in this branch of the covenant. But that is not all; let us look next to the rest of the covenant: "shall and will upon request unto him or them to be made by the said William Wright, his executors, administrators, and assigns, from time to time renew the said lease, and perfect such other further assurances." In one of the other provisions, it was "further assurance," as he "the said William Wright, his executors, administrators, and assigns should reasonably devise, advise, or require for the better strengthening, confirming, and sure making of all and singular the said demised and granted premises, and every part thereof, unto the said William Wright, his executors, administrators, and assigns, at such rents and under such covenants, and conditions in the said indenture of lease," and so forth. That is a very strong confirmation of the opinion to which the Court below came, that it is only in reality a covenant for further assurance, though under the form of the word "renew." Next, and lastly, let us look to the rest of the covenants. If there had

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been a lease for seven years renewable for ever, so as to oust for ever the enjoyment except in case of forfeiture (and there is no forfeiture provided for in the lease nor in the counterpart); if the grantor or lessor was never likely to enjoy it at all, what possible interest could he have in keeping up the plantations on the estate? Yet there is an express stipulation on his part, and an obligation imposed on the lessee, that he shall at all times during the term keep up the number of 500 oak trees on the premises. This is perfectly intelligible, if you read it as a covenant for further assurance; it is keeping up the timber on the estate with a view to the interest of the lessor in the reversion; but if the reversion is worth nothing, if it is postponed indefinitely by perpetual renewal of the term to the lessee and his representatives, that covenant is not rational or intelligible.

Then it is said—(and that was much relied upon)—you will find in this case there are no successors named in these covenants. And why should there be? Look at the time at which it was granted—in 1668,—at a period when there were forfeitures in consequence of rebellion, when this very estate may have been the subject of forfeiture, or at least of conflicting claims. I can easily understand how such covenants should be inserted, and I am told it is stated at the bar, and not denied, that this is by no means uncommon in those leases of ancient date touching property passing from hand to hand in these troublesome times. It is not easily to be presumed in any case that there should be a parting with the whole interest, under the form of a leasehold. I don't speak of perpetuity; that has no application here. There is no perpetuity created; though it may be a term for ever, there is

nothing resembling a perpetuity, if there are always existing parties who may deal with the whole interest created. If I give a lease as long as the grass shall grow and the waters shall flow, provided I don't tie it up to A. B. and the heirs of his body, nor in any definite succession, and put the land *extra commercium*, that would not be a perpetuity; if there must always be *in esse* a party or parties who have a right, within the limits allowed by law, (a life or lives in being, or twenty-one years and ten or eleven months afterwards,) to deal with it within those limits. Therefore the argument of perpetuity in this case must be put entirely out of view, and the judgment is not affirmed with any reference to it. But in the construction of the instrument the perpetual duration has much weight. When you see parties leasing, you are not easily to suppose, that, under the form of making a lease, they mean to give a perpetual interest. The usual mode of dealing with property in perpetuity, is not to convey it out and out by leasehold. I do not mean to say it may not be called a lease. Half the land in Manchester and its neighbourhood stands on that footing,—on a lease at a small reserved rent, or a considerable, valuable, and adequate reserved rent, sometimes upon 1s. an acre, sometimes 1l., but generally on the smaller rent; and that is a valid lease: you have no doubt on the instrument that it is creating a lease—no doubt whether it is for further assurance or renewal in perpetuity. There is hardly any renewal in it; it is at once by its original constitution a perpetual lease, an interest resembling the Scotch *feu* for a fixed rent. But what happened at the time when these deeds were originally executed—when the conveyances were originally made?

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There was a consideration given, an adequate consideration ; a sum was levied or given at the time, 1000*l.* for an acre ; in Manchester it is done every day. 'The sum for an acre of land, and a payment beside of 1*s.* a year for ever and ever, and it is leasehold and not freehold. But first the 1000*l.* is given ; for the instrument of lease, generally speaking, purports to have been granted on that consideration. That is not the case here ; not a penny is given here, but it is merely for the rent reserved in 1663 and no more, and that rent never to rise : and this lease is pretended to be a perpetually renewable lease. That is a strong argument, when the matter remains *in dubio*, for casting a balance in favour of that construction which holds it to be a covenant for further assurance, and not that construction which holds it to be for perpetual renewal.

There are other reasons, all in the same direction : the place of the instrument, where it is found ; the context of the covenant itself ; the context of the other covenants, especially as to the timber. It is argued for the Appellant against the judgment, that there is no covenant to keep in repair : that certainly would diminish the force of the argument, but not sufficiently to remove it ; and I have no manner of doubt that the conclusion to which the Court below came, was, as I originally thought on the hearing of the case, the sound conclusion. I therefore think your Lordships would do right to affirm this judgment, and, there not being sufficient doubt, in my opinion, considering the great attention paid to it in the Court below, to affirm it with the costs of the appeal.

Judgment affirmed, with costs of the appeal,
not exceeding 200*l.*

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(COURT OF CHANCERY.)

EDWARD HOULDITCH, JOHN HOULDITCH, JAMES HOULDITCH, and FRANCIS STUBBS, on behalf of themselves and other Creditors of the Most Noble GEORGE AUGUSTUS, Marquis of DONEGAL - } *Appellants;*

The Most Noble GEORGE AUGUSTUS, Marquis of DONEGAL - - - } *Respondent.*

Upon a bill filed in the Court of Chancery in England, by creditors, a decree was made to execute the trusts of a deed by which lands in Ireland were vested in trustees for the payment of debts. The debtor, a peer of the realm, did not answer the bill nor appear at the hearing of the original suit; but filed an answer to a supplemental suit, and by cross bill impeached the debts as fraudulent, and opposed the proceedings by counsel in various stages of the supplemental suits. By the decrees in these suits, an injunction and a receiver were appointed. But it being found impracticable to execute the decree, a bill was filed in the Court of Chancery in Ireland, to carry the former decree into execution. Held, reversing the judgment of the Court below, that, under the circumstances, the Court had jurisdiction; that the propriety of the English decree might be examined in the suit in Ireland; but that if part of it was sustainable, it might so far be executed by the aid of the Irish Court, although other parts might be erroneous.

THE Appellants, in the month of December, 1828, exhibited their original bill of complaint, in the High Court of Chancery in Ireland, against

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the above-named Respondent, and James Dashwood and William M'George, Esqrs., and thereby stated, that in or as of Trinity Term, in the year 1802, Henry Thomas Jones and Inigo William Jones, as administrators, with the will annexed, of the estate and effects of Henry Jones, deceased, did on behalf of themselves and all other the creditors of the said Respondent, George Augustus, Marquis of Donegal, exhibit their original bill of complaint in the High Court of Chancery in England, against the said Respondent, George Augustus, Marquis of Donegal, the said James Dashwood, John Agnew, since deceased, the said William M'George, William Lyon, since deceased, Peter Young and John King, stating, amongst other things, that upon the death of Arthur, the late Marquis of Donegal, in the year 1799, the said George Augustus, Marquis of Donegal, became seised for life without impeachment of waste, subject to certain family provisions and incumbrances, of divers large real estates in the kingdom of Ireland, of very considerable yearly value, beyond all reprises, and that the said George Augustus, Marquis of Donegal, was also entitled to a share of the joint stock of the Company of Undertakers of the Logan Navigation, equivalent to the sum of 51,000*l.*, part of the stock, that sum having been subscribed and paid to the said undertaking by the said Arthur, late Marquis of Donegal: And that the said George Augustus, Marquis of Donegal, having contracted very large debts, which he was desirous of providing for by conveying his said life estate and the said navigation shares to trustees, upon trust to grant securities to his creditors, by way of debenture, in manner therein-after men-

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tioned, by indenture dated the 20th of April, 1799, and made between the said Respondent, George Augustus, Marquis of Donegal, of the first part, the said James Dashwood, John Agnew, and William McGeorge, William Lyon, of the second part, and Francis Const, Esq. and George Downing, Esq., of the third part, after reciting various family deeds and settlements, which had been executed and made, touching the said estates in the lifetime of the said Arthur, late Marquis of Donegal, and also reciting the death of the said Arthur, late Marquis of Donegal, leaving the said George Augustus, Marquis of Donegal, his eldest son, who had therefore succeeded to all his titles and dignities, and had also become entitled to the possession of the several estates under the several therein-before recited indentures, subject to the therein-mentioned incumbrances; and reciting that the said George Augustus, Marquis of Donegal, had, since the date and execution of the therein-recited indenture of the 24th of May, 1794, contracted several other debts to a considerable amount; and being wholly unable to make any provision for the payment thereof, otherwise than by sale of the aforesaid navigation shares, and out of the income of the estate which he then was, and on the decease of Barbara, Marchioness Dowager of Donegal, his mother-in-law, would become entitled to for his life, in manner therein-before recited, was desirous of securing the monies arising by sale of the said navigation shares, and so much of such income as was not essential to the support of himself and his family, in a manner consistent with his rank and dignity in life, for the benefit of his creditors, or such of them as should

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be willing to accept the terms thereby offered to them, and would consent to such acts as therein requested of them; and that in order to carry such intentions into execution so far as respected the said navigation shares, the said George Augustus, Marquis of Donegal, had: and by an indenture therein mentioned to be made between the said George Augustus, Marquis of Donegal, of the one part, the said James Dashwood, John Agnew, William M'George, and William Lyon, of the other part, assigned and transferred unto the said James Dashwood, John Agnew, William M'George, and William Lyon, their executors, administrators, and assigns, all his share or shares, right and interest, in and to the said joint stock of the Company of Undertakers of the Logan Navigation, to hold upon the trusts therein mentioned: It was witnessed that in consideration of the premises and furtherance of the desire of the said George Augustus, Marquis of Donegal, in that behalf, and in consideration of ten shillings, by the said James Dashwood, John Agnew, William M'George, and William Lyon, paid to the said George Augustus, Marquis of Donegal, he, the said George Augustus, Marquis of Donegal, granted and demised to the said James Dashwood, John Agnew, William M'George, and William Lyon, their executors, administrators, and assigns, all the estates of him, the said George Augustus, Marquis of Donegal, in the kingdom of Ireland, therein particularly mentioned and described, and to which he, the said George Augustus, Marquis of Donegal, became entitled, as tenant for life, in possession, and in remainder expectant on the decease of Barbara, Marchioness of Donegal, his mother-in-law,

to hold unto the said James Dashwood, John Agnew, William M'George, and William Lyon, their executors, administrators, and assigns, for ninety-nine years, without impeachment of waste, if the said George Augustus, Marquis of Donegal, should so long live, subject nevertheless to the several incumbrances in the said indenture mentioned, being the several deeds and settlements subject to which the estates had vested in the said George Augustus, Marquis of Donegal, on the death of his said father, upon the trusts and for the intents and purposes, and subject to the powers, conditions, limitations, and agreements therein-after limited and declared, that is to say, in trust, in the first place, out of the rents, issues, and profits arising from the premises thereby demised, to pay and discharge the costs of preparing and executing that deed, and all tithes, taxes, rates, quit-rents, and other outgoings and payments required to be made in respect of the said premises, or any of them, and all expenses of keeping the said premises in good repair and condition, and of rebuilding houses and other buildings when necessary, and the salaries of all receivers, stewards, or agents, or other persons employed in receiving or recovering such rents, issues, and profits respectively, and all other expenses incident to or attending the recovery or receipt of such rents, issues, and profits, or otherwise, occasioned by or in the execution or otherwise of any of the trusts, powers, or authorities therein contained, or thereby given, or in any wise relating thereto; and in the next place, to pay unto the said George Augustus, Marquis of Donegal, during his natural life, for the maintenance and support of himself and his family,

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the clear yearly sum of 10,000*l.*, by equal half-yearly payments, on the 5th of July, and the 5th of January, in every year, clear of all taxes except the then present tax upon income, the first of which payments should be made on the 5th of July then next; and as to the residue of the monies arising from such rents, issues, and profits, and the annual produce of the said navigation shares, until sold, and the monies arising from the sale thereof, after discharging all expenses incident thereto, it was thereby agreed, that the same should be an accumulating fund in the hands of the said James Dashwood, John Agnew, William M^cGeorge, and William Lyon, or of the survivor or survivors of them, or the executors, administrators, or assigns of such survivor, for the intents and purposes, and should be from time to time applied in manner therein-after mentioned: And in order that the fund so intended to accumulate might be rendered as productive as possible for the purposes of that deed, it was thereby declared, that when the said trustees should have in their hands any sum or sums of money not immediately applicable to such purposes, which should exceed the sum of 1000*l.*, the same should be invested by the said trustees in the public funds, or on East India bonds, or Exchequer or Navy bills, or Government saleable securities in the names of such trustees for the time being, to be changed, altered, or varied at discretion; and that the interest, dividends, premiums, or other profits to arise therefrom should be applied by such trustee or trustees in like manner with the sum or sums so to be laid out: And in order that substantial justice might be done between the said George Augustus, Marquis of Donegal, and his

several creditors, whose debts had not been already provided for under the trusts of certain indentures therein mentioned to have been executed in the lifetime of the said late Marquis, by him and the said George Augustus, Marquis of Donegal, it was thereby agreed that the said James Dashwood, John Agnew, William M'George, and William Lyon, should forthwith proceed to investigate the nature, extent, and origin of the several claims of such creditors respectively, and what securities had been given to them, and what considerations had been received by the said George Augustus, Marquis of Donegal, for the same, according to the best of their abilities; and that it should be lawful for any two or more of them, the said James Dashwood, John Agnew, William M'George, and William Lyon, or the survivor of them, or for the executors and administrators of the survivor, to confirm, disallow, liquidate, and settle every or any such claims, and to enter into any contracts or agreements with all or any such claimants for compounding such claim or claims, or for altering the nature or course of payment thereof; and also for redeeming, continuing, or confirming every or any annuity or annuities in lieu of any debt or debts which should be found due from him; and also power to enter into any agreement with such creditors respectively, or any two of them, touching the time or times, and the manner how their respective debts or claims should be liquidated, settled, and discharged, and whether any and what interest should be allowed thereon; and if they should think proper so to do, to issue assignable debentures to such creditors or any of them for the better securing the performance of such con-

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tracts or agreements as last mentioned, so as each and every creditor accepting any such debentures should enter into an agreement not to molest the said George Augustus, Marquis of Donegal, for their debts, unless default should be made in payment of any sum or sums of money at any time or times to be appointed in and by such debenture for that purpose, and so as no debenture should be valid until the same should be executed by the said George Augustus, Marquis of Donegal: And powers were by the said indenture given to the said trustees to do all acts necessary for carrying the several agreements so to be executed into execution, and likewise power, when it should appear advisable or necessary for the regulation of their conduct, to take opinions of counsel, or to submit the justice or extent of any such claims as aforesaid to the award of any person or persons whomsoever, and to do all things necessary in that behalf, and also to commence, prosecute, and defend all such actions at law and in equity in any of the courts of Great Britain or Ireland, or elsewhere, as they should think necessary for resisting the payment of any such claim or claims as should be conceived illegal or excessive, or for the setting aside any annuity or annuities if necessary, and generally to do all things necessary and effectual in that behalf; and to appoint and countermand at pleasure all such persons as they should think necessary to be their attornies, agents, stewards, or bailiffs, in the management and conducting of any of the estates thereby demised, and of the receipts and rents thereof, or for any other purpose or occasion whatsoever, and to make such allowance, payments, and compensation

to such persons respectively as should be reasonable: And that it was thereby agreed, that the said James Dashwood, John Agnew, William M'George, and William Lyon, should dispose of the fund thereby directed to accumulate as aforesaid, at such respective times and in such proportions as should be necessary towards the payment of such respective debts, annuities, claims, and demands as should be substantiated, compounded for, or secured in manner aforesaid, at the times and according to the intent and meaning of such respective agreements; and also all interest, costs, charges, expenses, salaries, and allowances thereinbefore provided for, when it should be necessary so to do; and in case there should be any surplus monies, stocks, funds, and securities in their hands or names, or in the hands or name of any of them, after all such payments, accounts, matters, and things as aforesaid should have been duly liquidated or discharged, or be no longer payable, the same should be in trust for and paid and transferred to the said George Augustus, Marquis of Donegal, his executors, administrators, and assigns, and for his and their own use and disposal: And that it was thereby further agreed, that it should be lawful for the said James Dashwood, John Agnew, William M'George, and William Lyon, or the survivors and survivor of them, or the executors, administrators, or assigns of the survivor, in case the majority in value of the creditors of the said George Augustus, Marquis of Donegal, whose debts were not then already secured or provided for by the therein-recited indenture, and who should for the time being have established their claims to the satisfaction of the said James Dash-

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wood, John Agnew, William M'George, and William Lyon, or any of them, should so require, to insure upon the life of the said George Augustus, Marquis of Donegal, any sum or sums of money, not exceeding the total amount of the claims which should have been made and established by such creditors for the time being, to such satisfaction as aforesaid, in any public office of assurance in Great Britain or Ireland, or upon any private policy or policies to be underwritten at Lloyd's coffee house, in the city of London, and to pay the premiums, and all other payments in respect of such policy, out of the rents and profits of the premises thereby demised, which should from time to time remain after payment of the said annuity to the said George Augustus, Marquis of Donegal: And that it was thereby further declared, that in case all and every the debts and annuities then already contracted or granted by the said George Augustus, Marquis of Donegal, and which were not then already provided for as aforesaid, or the compositions to be accepted in satisfaction thereof, and all interest for the same, and all other payments thereby provided for, save and except such as regarded the future outgoings of the estate thereby demised, should be satisfied before the decease of the said George Augustus, Marquis of Donegal, then the said James Dashwood, John Agnew, William M'George, and William Lyon, should, at the request, costs, and charges of the said George Augustus, Marquis of Donegal, assign the said term of ninety-nine years thereby granted unto the said George Augustus, Marquis of Donegal, or his assigns, or as he or they should direct: And that the said George Augustus, Marquis of Donegal, thereby cove-

nanted and agreed, that he would make and execute such demises and leases of all and every or any of the premises thereby demised, in pursuance of the powers or authorities vested in him by the therein-before recited indentures of release of the 19th day of May, 1792, and the 23d day of May, 1794, respectively, as any two or more of them, the said James Dashwood, John Agnew, William M'George, and William Lyon should direct or require, and that all and singular fines, premiums, and other payments to be had and received on granting each such lease and demise should be paid to the said James Dashwood, John Agnew, William M'George, and William Lyon, upon the trusts therein-before expressed concerning the rents, issues, and profits of the same premises respectively ; and that each of them, the said James Dashwood, John Agnew, William M'George, and William Lyon, thereby covenanted with the said George Augustus, Marquis of Donegal, and also with the said Francis Const and George Downing, their executors, administrators and assigns, that they would exert their utmost endeavours to manage all and singular the trusts thereby reposed in them therein to the best advantage, according to the best of their judgment, and would faithfully dispose of the rents, issues, fines, and profits arising from the said premises thereby demised, according to the intent and true meaning of those presents ; and would once, or oftener, every year, if thereunto required, produce unto the said George Augustus, Marquis of Donegal, or his assigns, or unto the said Francis Const, and George Downing, their executors, administrators and assigns, on behalf of the creditors of the said George Augustus, Mar-

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quis of Donegal, when thereunto required, an account of the dealings, and transactions, and payments under the trusts and powers thereby reposed in them: And that it was thereby also provided, that notwithstanding the appointment of the said William Lyon to be a trustee for the purpose aforesaid, it should be lawful for him to be continued and act in the management and conduct of the several matters and things as an attorney or solicitor, and do all law business required to be done in the premises, and usually executed by attornies or solicitors in such manner, and to receive such recompense for his loss of time and pains in and about the affairs of the said George Augustus, Marquis of Donegal, and the trusts thereby created, as he would have been entitled to have been allowed in case he had been employed by the said George Augustus, Marquis of Donegal, or by the trustees thereby appointed for all or any of such purposes, without being himself one of the trustees; and also stating amongst other things certain indentures and subsequent matters under which the Plaintiffs in the said cause claimed the benefit of the said trusts: And praying that an account might be taken of the rents, issues, and profits of the said trust estates, and all other the property which had been received by the said Defendants, James Dashwood, John Agnew, William M'George, and William Lyon, under and by virtue of the said trust deed, or which without their wilful default might have been received, and of the monies laid out and expended by them in the due execution of the trusts thereby in them reposed, and that the balance remaining in their hands might be ascertained, and that they might

be decreed to pay the same in discharge of the interest and instalments that should be found due to the said Plaintiffs, and such other creditors as in the said bill mentioned, so far as the same would extend; but in case the said Court should be of opinion, that from any circumstances whatsoever the Plaintiffs in the said Bill were not entitled to be satisfied out of the said trust property, then that the Defendants, John King and Peter Young, might be decreed to pay the said Plaintiffs, as the personal representatives of the said Henry Jones, all money due on the debentures therein particularly mentioned, and that for that purpose an account might be taken of all such principal and interest respectively, and that in the mean time a receiver of the said trust estates might be appointed with all proper directions, and for further relief; and further stating, that all the said several Defendants to such bill, except the said George Augustus, Marquis of Donegal, who, by an amendment of the said bill, was charged to be out of the jurisdiction of the said Court, afterwards duly appeared and put in their answer to the said bill; and that by an order of the said Court made in the said cause, bearing date the 2d of March, 1803, it was referred to one of the Masters of the said Court to appoint a receiver or receivers of the rents and profits of such of the estates in question in the said cause, of which a receiver had not already been appointed, with the usual directions in such cases; and further stating, that in pursuance of such order the Master to whom the same matter was referred, by his report bearing date the 5th of April, 1803, certified amongst other things that Henry Alexander, of London-

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derry, in Ireland, and of Queen Ann Street, Westminster, in the county of Middlesex, in Great Britain, had been proposed to him by the Plaintiffs in the said suit, as a proper person to be appointed receiver of the rents and profits of the estates, consisting of part of the barony of Ennishowen, and the lands thereunto belonging, situate in the counties of Donegal and Londonderry, in Ireland, then let to divers tenants at sundry yearly rents, amounting to the sum of 8500*l.*, or thereabouts; and of which the said Henry Alexander had been for many years then past receiver; and that he had approved thereof; and further stating, that in further pursuance of the said order of the 2d of March, 1803, the Master, by his report bearing date the 17th of June, 1803, certified that the said Henry Alexander had been proposed to him by the Plaintiffs in the said suit, as a proper person to be appointed receiver of the rents and profits of the residue of the estates in question in Ireland, of which the yearly value was 25,000*l.*, or thereabouts, and that he approved of such proposal, &c. And further stating, that divers further proceedings having been had in the said cause, the same came on to be heard before the Master of the Rolls in Great Britain, on the 27th of July, 1803, against all the Defendants except the said Respondent, and that by the decree made on such hearing, it was ordered and decreed that it should be referred to Mr. Ord, then one of the Masters of the said Court, to take an account of what was due to the said Plaintiffs, and all other the creditors of the said Marquis of Donegal, whose debts accrued due before the execution of the indenture of the 20th of April, 1799, in the pleadings named, and

to compute interest on such of the said debts as carried interest, with the usual directions to advertise for such creditors: And it was thereby further ordered, that the said Master should take an account of the rents and profits of the trust estates in question, received by the said James Dashwood, John Agnew, William M'George and William Lyon, or any or either of them, under or by virtue of the said trust-deed, or by any person or persons, by their or any of their order, or for their or any of their use, and which without their respective wilful default might have been received; and the said Master was also thereby ordered to take an account of the monies laid out and expended by the said trustees, in the execution of the trusts reposed in them; and it was thereby ordered, that the clear balance of the said amount should be paid into the Bank of England to the credit of the said cause, and applied in payment of the debts due to the said Plaintiffs, and the other creditors of the said Marquis of Donegal, under the said deed; and it was thereby ordered, that the receiver appointed in the said cause should be continued, and should pass his accounts before the said Master, and should pay his balances from time to time into the said Bank of England, with the privity of the Accountant-General of the said court, on the credit of the said cause, and usual directions were thereby given for the passing of the said accounts, and the consideration of the costs of the said suit, and of all further directions, was thereby reserved until after the said Master should have made his report; and any of the parties were to be at liberty to apply to the Court, as they should be advised: And further stating, that by

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an order of the said Court, made in the said cause, and bearing date the 3d of August, 1803, it was ordered that the said Henry Alexander should be at liberty, in the name of the said James Dashwood, John Agnew, William M'George, and William Lyon, to distrain, sue for, and recover, and receive of and from the tenants of the said estates, all and every the rents and arrears of rent due from them at the time of his appointment: And further stating, that in pursuance of the said decree, the Master to whom the said cause stood referred, made his report in the said cause, bearing date the 10th of August, 1804, by which, among other things, he found that certain debts arising upon debentures issued under the trusts of the deed, were due and owing respectively to Bennis Berry, Sir John Lade, and the Appellant, Francis Stubbs: And further stating that by an order made in the said cause, and bearing date the 30th of October, 1804, the said Master's said report was confirmed *nisi*, and afterwards various exceptions were taken to the said report, (not however by or against Bennis Berry, or Sir John Lade, or the Appellant, Francis Stubbs,) which exceptions came on to be argued, and the matter of which exceptions was by various orders of the said Court referred back to the Master: And further stating, that in or as of Easter Term, in the year 1807, the said Inigo Jones, as survivor of the said Henry Thomas Jones, exhibited his supplemental bill, or bill in the nature of a supplemental bill, in the said Court, against the said George Augustus, Marquis of Donegal, thereby stating, amongst other things, the said indenture of the 20th of April, 1799, and the other matters herein-before

mentioned to have been stated in the said original bill, and the prayer of said original bill, and the said several decrees, orders, and the several proceedings had in the said suit, and stating therein that the said Plaintiffs finding that the said George Augustus, Marquis of Donegal, had gone to reside in Ireland, they had amended their said original bill, and stated him to be out of the jurisdiction of the Court; and stating, among other things, a certain order, under which, what should remain of a certain sum of 4,861*l.* 2*s.* 10*d.* three per cent. consolidated Bank annuities, after paying certain costs, was to be carried over by the Accountant-General of the said Court to the credit of the said original cause; and stating, that, pursuant to an order made in the said original cause, the said Henry Alexander had paid into the Bank of England, in the name and with the privity of the Accountant-General, as part of the money received by him as such receiver as aforesaid, the sum of 1000*l.*, and that such Bank annuities and costs constituted the whole property which the said Plaintiffs by means of the said proceedings had been able to get at from the rents and profits of the said trust estate, towards satisfying themselves and the other creditors of the said Marquis, who had come in under and sought the benefit of the said decree; and that the Plaintiffs and the other creditors of the said George Augustus, Marquis of Donegal, had been prevented from obtaining the benefit of the said decree, and that the said Henry Alexander, as such receiver as aforesaid, had been deprived of or obstructed in the receipt of the rents and profits of the said trust estates by the said George Augustus, Marquis of Donegal,

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and that the said George Augustus, Marquis of Donegal, on or about the 27th of March, 1803, had notice that the said Court had pronounced the aforesaid order, and that after he had the said notice of such order, and since the appointment of the said Henry Alexander to be such Receiver, he had continued to receive and still received the said rents and profits; and stating that, among other acts of the said George Augustus, Marquis of Donegal, for obstructing and preventing the payment of the said rents upon the trusts of the said deed, he had caused an advertisement to be published in the *Londonderry Journal*, on the 8th of June, 1803, and in the *Donegal and Tyrone Advertiser* of the 28th of the same month, and on several other days, in the words or to the effect following, that is to say: "The tenantry of my " estates in the counties of Donegal and London- " derry are to take notice that I shall attend at " Derry on the 1st of August next, to receive my " rents and arrears, and they are not to pay to any " other person whatsoever without my further par- " ticular directions. — DONEGAL:"—And that with the like design and about the same time he had caused two other printed notices or handbills of a similar tendency, one dated the 27th of June, 1803, and the other dated the 4th of July, 1803, to be distributed amongst the tenants of the estates comprised in the said indenture, and had made applications, or caused notices to be given to the several tenants of the estates comprised in the said indenture, and directed them not to pay the rents of the estates in their respective holdings to the said Henry Alexander as such receiver as aforesaid; and that the said Henry Alexander had obtained the afore-

said order of the 3d of August, 1803, authorizing him in the names of the said James Dashwood, John Agnew, William M^cGeorge, and William Lyon, to distrain, sue for, and recover and receive of or from the tenants of the said estates all the rents and arrears of rent due at the time of his appointment; and that the said George Augustus Marquis of Donegal, on or about the 3d of August, 1804, had published and distributed another printed notice among the tenants of the said estates or some of them, in the words or to the effect following; that is to say, "As I understand Mr. Alexander has again attempted to interfere in the receipt of my rents, contrary to my directions, under a fictitious proceeding in the English Court of Chancery, I give this further notice to my tenantry in the barony of Ennishowen, on no account to pay Mr. Alexander or his order any rents whatsoever, and that if any person shall have done or may hereafter do so, I shall oblige him to repay the same to my agent and receiver, whose nomination shall be publicly made known on a further occasion. — DONEGAL. — *Belfast, 3d January, 1804.*" — And further stating, that the said Marquis of Donegal had then lately returned to England, and was resident within the jurisdiction of that Court; and praying that the said Inigo William Jones might have the benefit of the said decree, and the said orders and proceedings in the said cause, and might be at liberty to prosecute the same, and carry on the said accounts against the said trustees, as the said Inigo William Jones would have been entitled to have done, in case, at the time when

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the aforesaid decree was pronounced, the said George Augustus Marquis of Donegal had been within the jurisdiction of the said Court, and amenable to the process thereof; and that the said George Augustus Marquis of Donegal, and his agents and servants, might be restrained by the injunction of the said Court from receiving the rents of the said estates, or any of them: And further stating, that the said George Augustus Marquis of Donegal appeared, and put in his answer to the said supplemental bill, or bill in the nature of a supplemental bill, and that by such answer he admitted the execution of the indenture of the 20th of April, 1799, and that the same had been registered in the proper office in Ireland; and he admitted that such suits were instituted in the said Court of Chancery in England, and such proceedings had therein as stated in the said Plaintiff's bill; but he said that such proceedings had been carried on in his absence; he submitted that he ought not to be prejudiced by such proceedings, relying upon his absence during the said proceedings as a reason why he should not, as Inigo William Jones had filed a bill in the Court of Chancery in Ireland for the same purpose, which latter bill the Respondent had answered; that the Plaintiff was not entitled to any account against the Respondent until he should have established, to the satisfaction of the Court, a full, just, and *bond fide* consideration for the demand claimed by virtue of the debenture in respect of which he claimed: And he stated that some short time after he went to reside in Ireland, that is to say, in the month of March, 1802, he did, under the sanction

of such opinions and advice as therein mentioned, assume to himself the receipt of the rents and profits of his family estates, and the controul over the same, and under the authority of such opinion he thereby admitted that he caused the advertisements to be inserted in the public newspapers, and the notices which were stated in the said bill to be served upon his tenants for preventing their paying their rents to Mr. Henry Alexander in the said bill named, or to any other person, without his particular directions: And further stating, that by an order of the said Court, bearing date the 17th day of August, 1807, and made in the said original and supplemental causes, and in a cause wherein John Downes, Esq. was Plaintiff, and Rees Goring Thomas, and others, were Defendants, and also in a cause wherein Elizabeth Downes, widow, was the Plaintiff, and the said Rees Goring Thomas and others were the Defendants, it was ordered that an injunction should be awarded to restrain the said George Augustus Marquis of Donegal from receiving or interfering in the receipt of the rents and profits of all or any part of the several estates comprised in and demised by the indenture of the 20th of April, 1799, in the pleadings in the said first mentioned cause stated; and it was ordered that Henry Alexander, Esq., the receiver appointed by the said Court in the said first mentioned cause of the rents and profits of the estates in question, should be at liberty to use the name of the said George Augustus Marquis of Donegal, either jointly with or separately from the said Defendants, John Agnew, William M'George, and William Lyon, the survivors or

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survivor of them, in any action, suit, or other proceedings for the purpose of obtaining the possession of the said estates, and receipt of the rents and profits thereof; and it was ordered, that the said Henry Alexander should keep a separate account of the rents and profits which should be received by him of the estates in the barony of Ennishowen, comprised in the term of years created by the indenture of the 23d of May, 1794, mentioned and referred to in the said cause of *Downes v. Thomas*; and it was ordered, that the said Henry Alexander should pay the balance of what he should receive, in respect to the said last mentioned orders, into the Bank of England, with the privity of the Accountant-General of this said Court, to the credit of the said cause of *Downes v. Thomas*, subject to the further order of the said Court: And further stating, that after divers proceedings in the said supplemental cause, the said supplemental cause came on to be heard on the 29th day of February, 1808, before the Master of the Rolls in England, in the absence of the said George Augustus Marquis of Donegal, who made default, and thereupon a decree was pronounced, whereby it was decreed, that the said Inigo William Jones should have the benefit of the said suit instituted by him and the said Henry Thomas Jones, and after the death of the said Henry Thomas Jones prosecuted by him, and of the decree and orders and other proceedings therein as against the said George Augustus Marquis of Donegal; and it was thereby further ordered, that the said indenture of the 20th of April, 1799, should be established, and the trusts thereof carried into execution

against the said George Augustus Marquis of Donegal; and it was thereby further ordered, that the receiver appointed of the rents and profits and produce of the estates in question in the said original cause should be continued, and that the injunction granted by the said order made in the said original cause, and in that cause, and in the cause of *Downes v. Thomas*, of the 17th of August 1807, should be continued, and that the said receiver should continue to keep separate accounts of the rents and profits of the said estates as directed by the said order; and that the said Plaintiff, Inigo William Jones, should have the benefit of the said last-mentioned order, in such and the same manner as if the directions therein contained were part of that decree, and therein repeated; and that it was thereby ordered that such of the accounts and inquiries as were directed by the said decree and orders in the original cause, and were then depending, should be carried on and prosecuted, as well against the said George Augustus Marquis of Donegal, the Defendant in that cause, as against the said Defendants in the said original cause, in like manner as the same might have been done in case the said Defendant, the Marquis of Donegal, at the time when the said decree and orders were respectively pronounced, had been before the Court and a party thereto; and the consideration of the costs of that suit, and of all further directions, was thereby reserved until the Master should have made his report; and the said decree was to be binding on the Defendant, the Marquis of Donegal, unless he being served with a subpoena to shew cause against the same, should, at the return thereof, shew unto the Court

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good cause to the contrary, he being first to pay such costs as therein named : And further stating, that by an order made in the said supplemental cause by the Lord High Chancellor of Great Britain, bearing date the 22d day of June, 1808, on the petition of the said complainant, Inigo William Jones, and purporting to be on production of an affidavit of service of subpœna as aforesaid, the said decree of the 29th of February, 1808, was made absolute : And further stating, that by an order of the said Court, bearing date the 24th of November, 1820, made in the said original and supplemental causes by the Right Honourable the then Vice-Chancellor of England, on the motion of the Appellants, and of one James Goddell, supported by affidavits, suggesting among other things that the personal representative of the said Henry Jones, therein named, had become legally entitled to the benefit of the said suit and proceedings ; and that the deponent, John Houlditch, had been informed and believed that some time in the year 1810 Matthew John Tierney, and Harriet Mary, his wife, and Anna Maria Tierney, the administratrix of the said Jones, along with the said Henry Alexander, the receiver, had instituted a suit in the Court of Chancery in Ireland, for prosecuting their claims against the said Defendants, and had obtained from the said Marquis of Donegal, or some person or persons acting on his behalf, payment of, or some security or satisfaction for, their claims in the said cause ; and that subsequently all proceedings had been discontinued or at an end in the said suit in Ireland, and that it appeared that no further proceedings had been had in the said cause in England since the said last herein-

before-mentioned decree had been obtained ; and on hearing counsel for the said George Augustus Marquis of Donegal, and for Sir Matthew John Tierney, Bart., and Harriet Mary, his wife, and Edward Tierney, and Anna Maria, his wife, appearing in right of the said Harriet Mary and Anna Maria, as administratrixes of the effects of the said Henry Jones, left unadministered by the said Henry Thomas Jones and Inigo William Jones, and for the said James Dashwood and William M'George, as survivors of the said John Agnew, and the said Sir Matthew John Tierney, and Harriet Mary, his wife, and the said Edward Tierney, and Anna Maria, his wife, by their counsel, declining to file a bill of revivor in the said causes, it was ordered that the said Appellants should be at liberty to file a supplemental bill in the said cause, to have the benefit of the said proceedings in the said original and supplemental causes ; and further stating, that the said Appellants, in or as of Hilary Term 1821, accordingly exhibited their supplemental bill in the said High Court of Chancery in England, against the said George Augustus Marquis of Donegal, James Dashwood, and William M'George, and against the said Bennis Berry, Sir John Lade, John King, and George Grant, as Defendants thereto, thereby stating the several proceedings in the said original and supplemental causes, and that the said Inigo William Jones had died in or about the year 1809, and that thereby the said suits and proceedings had become abated, and that the said Harriet Mary, then the wife of the said Sir Matthew John Tierney, Bart., and Anna Maria Jones, then the wife of the said Edward Tierney, Gentleman, had obtained

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letters of administration of the goods and chattels, rights and credits of the said Henry Jones left unadministered by the said Henry Thomas Jones and Inigo William Jones, with the will of the said Henry Jones annexed, to be granted to them by and out of the proper Ecclesiastical Court, and had thereby become and were the sole legal personal representatives of the said Henry Jones; and that the said Bennis Berry, by several instruments in writing, signed by the said Bennis Berry, bearing date respectively the 28th day of March, 1810, and endorsed on each of the said several debentures proved by him before the said Master, had assigned the said several debentures and the sums so reported due to him thereon as aforesaid, and all interest accrued and to accrue due thereon, together with the securities for the same, unto George Grant, Esq.; and that the said George Grant had afterwards, by instruments in writing, bearing date respectively the 28th day of March, 1810, signed by him, and endorsed on the said debentures, numbered 1, 4, 11, 12, 15, 48, 57, and 106, being part of the said debentures so assigned to him as aforesaid by the said Bennis Berry, assigned the said debentures, and all sums due and to accrue due thereon respectively, unto the Appellants, Edward Houlditch, John Houlditch, and James Houlditch; and that the said George Grant had also by several instruments in writing, bearing date respectively the 20th day of June, 1816, signed by him, endorsed on each of the said two debentures numbered 79 and 80, being the remaining part of the said debentures, assigned and made over the said last-mentioned debentures, and all monies due and to accrue due thereon respectively, unto the said

Appellants, Edward Houlditch, John Houlditch, and James Houlditch ; and that the said Sir John Lade had also by several instruments in writing, bearing date the 1st day of November, 1810, and signed by him, and endorsed on each of the said debentures numbered 36, 37, 38, 39, and 40, assigned the sums so reported due to him as aforesaid, in respect of the aforesaid five several debentures of five hundred pounds each and all interests due and to accrue due thereon, together with the securities for the same, unto the Appellants, Edward Houlditch, John Houlditch, and James Houlditch ; and that the aforesaid sums respectively reported due to the Plaintiff Francis Stubbs, and assigned to the Appellants, Edward Houlditch, John Houlditch, and James Houlditch, were then unpaid : And that such supplemental bill further stated, that the Appellants, Edward Houlditch, John Houlditch, and James Houlditch, were also possessed by assignment of several debentures reported due in the said Master's report, and stating that the said Defendants, John Agnew and William Lyon, had both died, leaving the said Defendants, James Dashwood and William M'George, their coheirs, them surviving, and stating the aforesaid order of the 24th of November, 1820 ; and praying that the decrees made in the said suits might be carried into execution for the benefit of the Appellants and the other creditors of the said George Augustus Marquis of Donegal as aforesaid, and that the Appellants might have the benefit of the said suits and proceedings, and might be at liberty to prosecute the same, and to carry on the several accounts and inquiries by the said decree directed against the several persons therein named as

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Defendants thereto ; and that the said suits and proceedings might stand and be in the same plight and condition as the same were in at the time of the abatement thereof by the death of the said Inigo William Jones, or that the said Defendants thereto might shew good cause to the contrary: And further stating that all the said Defendants having appeared and put in respectively their joint answers to the said last-mentioned supplemental bill after divers proceedings had in the said last-mentioned supplemental cause, the same came on to be heard before the then Vice-Chancellor of England, on the 25th of November, 1823; and that by the decree made on such hearing, it was ordered and decreed that the aforesaid decree, dated the 29th day of February, 1808, and the accounts and inquiries thereby respectively directed, and the several orders and other proceedings in the said former causes of Henry Thomas Jones and Inigo William Jones against the Marquis of Donegal, James Dashwood, John Agnew, William M'George, William Lyon, Peter Young, and John King, and of the said Inigo William Jones, against the said Marquis of Donegal, should be carried on and prosecuted by and between the parties to that suit, in like manner as the same decrees and orders might have been prosecuted between the parties thereto if living and carrying on the same; and that by the same decree the consideration of all further directions and of the costs of that suit were reserved by the said Court, in like manner as the same had been reserved by the said former decrees: And further stating that the Master to whom the said causes and other matters therein were transferred, made his fur-

ther report in the said causes bearing date the 1st of July, 1825, and stating certain orders found that no further proceedings had been had in his office in these causes, or in either of them, other than those therein-before mentioned.

The bill then further stated, that by an order made in all the said three causes, and bearing date the 16th day of July, 1825, the said last-mentioned report was confirmed *nisi*; and afterwards by an order of the said Court made in the said causes, bearing date the 19th day of November, 1825, the said report was confirmed absolutely. And further stating, that the said three causes came on to be heard for further directions on the Master's report, and on the matter of costs, before the then Vice-Chancellor of England, on the 18th day of June, 1827, by whom it was ordered that the Appellants' bill, as against the Defendants, Bennis Berry, Sir John Lade, and George Grant, should be dismissed with costs, to be paid by the Appellants: And it was thereby declared that the several creditors in the Master's said report, and further report mentioned, and the Appellants in the last supplemental cause, as assignees of the said Bennis Berry, Sir John Lade, and George Grant, were entitled to be paid their respective debts, and the interest thereof, until such debts and interest should be paid in full out of the rents and profits of the trust estate in the pleadings mentioned, but debts secured by bond were not to bear interest so as to exceed the penalties of the bonds; and it was thereby further ordered, that the Master should carry on the accounts by the original decree directed to be taken against James Dashwood, John Agnew, William M^cGeorge, and William Lyon,

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the trustees under the trust-deed of the 20th of April, 1799, against the Defendants, James Dashwood and William M'George, the survivors of such trustees, from the foot of the said report of the 10th of August, 1804; and it was thereby further ordered that he should compute subsequent interest on the several principal debts stated in the Master's said report and further report, not computing interest on bonds so as to exceed the penalties, &c. : And after further stating that no further proceedings had been yet taken in the said causes in England, and that Henry Alexander, the receiver appointed in the said cause, died some years before the date of the said report of the said 1st day of July, 1825, and that the Respondent, by his tenants and agents, and persons acting under his directions and authority, or on his behalf, was in possession and receipt of the rents, issues, and profits of the estates and hereditaments comprised in the said indenture of the 20th of April, 1799; and that the said Respondent was resident in Ireland, and that by reason of the residence of the said Respondent, George Augustus Marquis of Donegal, out of the jurisdiction of the Court of Chancery in England, and out of the reach of the process of that Court, and by reason of the estates comprised in the said trust-deed of the 20th of April, 1799, being entirely situated in Ireland, the said Appellants could have no benefit of the said suits and proceedings, and of the said decrees obtained thereon, on behalf of themselves and the other creditors of the said Respondent, George Augustus Marquis of Donegal, without the aid and co-operation of the said Court: The bill prayed that the Appellants, and the other creditors of the

said George Augustus Marquis of Donegal, entitled, under the said trust-deed, and who should come in and contribute to the expenses of that suit, might be decreed to have the full benefit of the said several suits instituted and carried on in the said Court of Chancery in England, and of the said several decrees, orders, reports, and proceedings made and had in the same several suits; and that the said several decrees and orders might be enforced and carried into execution, so far as necessary, by and under the decree of the said Court of Chancery in Ireland, and that accordingly a proper person or proper persons might be appointed a receiver or receivers, and might be directed to pass his accounts in the said suits in England before the Master of the said High Court of Chancery in England, to whom the said cause stood transferred, in such manner as was directed by the said several decrees and orders stated in that behalf or otherwise, as the said Court of Chancery in Ireland should direct; and that the said George Augustus Marquis of Donegal might be restrained, by the injunction of the said Court, from receiving or further interfering in the receipt of the rents and profits of all or any part of the several estates comprised in and demised by the said indenture of the 20th day of April, 1799, in like manner as he was restrained therefrom by the said decree of the 17th day of August, 1807, or by the said decree of the 29th of January, 1808, or the said order making the same decree absolute; and that the said Marquis might furnish the receiver or receivers, so to be appointed as aforesaid, with a correct rental of the said estates, to enable him or them to receive and

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collect the rents thereof, and might also hand over to him or them, or bring and lodge in the Bank of Ireland to the credit of the said cause, the several counterparts of the tenants' leases of the estate, to be used by the said receiver in enforcing payment of the said rents, or otherwise, as occasion might require.

The Respondent appeared and put in his answer to the bill, and thereby, among other things, said that he was advised and believed that such only of his creditors as were fairly entitled to the benefit of the trusts of the said deed could have been entitled to any relief under the said bill, in case the same had been duly and regularly proceeded on: And that the order to appoint a receiver of the rents and profits of the Respondent's estates in Ireland, was, if at all made, behind the back of him, the Respondent, who was neither before the Court when the same was alleged to have been made, nor was, as he had been informed and believed, proved to be out of the jurisdiction of the Court; and he submitted that the said order, and all subsequent proceedings founded thereon, were, as to him, wholly irregular and erroneous; and that he believed that it was afterwards ordered in the said cause that the said Henry Alexander should be at liberty, in the names of the said James Dashwood, John Agnew, William M'George, and William Lyon, to distrain, sue for, recover, and receive from the tenants of the said estates in Ireland the rents and arrears of rent due from them at the time of his appointment; but submitted to the judgment of the said Court, that he ought not, under the circumstances therein appearing, to be at all

affected thereby, or by any of the proceedings in the said cause, or by the decree so pronounced therein.

He admitted that Inigo William Jones, as survivor of the said Henry Thomas Jones, in the year 1807 exhibited a supplemental bill, or bill in the nature of a supplemental bill, in the said Court of Chancery in England, against him, and that he appeared to the supplemental bill of the said Inigo William Jones, and on or about the 3rd day of July, 1807, answered the same; but he submitted that the course adopted in obtaining a decree behind his back, and then seeking to have the benefit of it so as to shut out all discussion on the merits or nature of the original claim, was itself highly objectionable and unfair, and such as the Court should not give effect to.

He believed that an order of the Court of Chancery in England was made in or about the month of August, 1807, that an injunction should be awarded to restrain him from receiving or interfering in the receipt of the rents in the indenture of the 20th day of April, 1799, and for the other purposes in the Appellants' bill in that respect set forth; that the supplemental cause was heard; but that it was as to the Respondent heard in his absence, and without his having been served with any process to appear and hear judgment.

He also believed that the Appellants, on or about the 24th of November, 1820, obtained an order in the said original and supplemental causes to file a supplemental bill, and that the supplemental cause was heard, and that an order or decree was pronounced therein, that the aforesaid decrees of July 1808 and February 1808, and the account thereby directed, should be carried on and prosecuted.

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But the Respondent further stated, that he had been advised, and submitted, that the decree and account having been originally irregular and erroneous in the particulars thereby relied on, did not cease to be so by reason of the said last-mentioned decree having directed them to be carried on and prosecuted; but that the said last-mentioned decree ought itself to be considered as irregular and erroneous, as being founded on the said irregular and erroneous decrees, and that the Respondent ought not to be precluded by any thing done under it.

He also submitted, that the decree of 1827, obtained in the Court of Chancery in England, being founded on the decrees in the original and further causes of Jones against the Respondent, which were, as the Respondent was advised and submitted, in the several respects therein mentioned, irregular, erroneous, and unjust with respect to the Respondent, ought not then to be taken as binding upon or conclusive against the Respondent, and that he ought not to be precluded thereby from defending himself upon the merits of his case, or from contesting the fairness of the demands made upon him by the said Appellant, and particularly those made by the Appellants Edward, John, and James Houlditch, who, as the Respondent believed, had speculated in buying up demands on the Respondent, which they knew to be impeached by him, and who, besides the instances therein mentioned, had for several years harassed and persecuted the Respondent with litigation for the recovery of the different demands on him, which the Respondent believed they had so bought up upon speculation with full knowledge of the objection-

able nature of them, and had declined all opportunity of trying the merits or validity of their said claims, which they might have done under the suits pending in the Court of Chancery in Ireland.

The Appellants replied to the answer, and issue being joined, evidence was entered into in the cause.

The Appellants proved the several orders and decrees of the Court of Chancery in England. These orders and decrees were produced and read at the hearing, and it thereby appeared that when several of the said decrees and orders were made and pronounced, the Respondent had appeared in the Court of Chancery in England, by his counsel, and opposed the making thereof, but never afterwards appealed therefrom; and that the Respondent, by his solicitor, attended in the Master's office in England upon the exceptions which were taken to the report of the 10th of August, 1804; and that the order of the 17th of August, 1807, restraining the Respondent from interfering with the receiver in the receipt of the rents and profits of the trust estates, was made after hearing the Respondent by his counsel; that the order of the 21st of November, 1820, giving leave to the Appellants to file a supplemental bill, was made after argument by the Respondent's counsel against the same; and that the Respondent, by his counsel and solicitor, afterwards appeared and was heard upon the subsequent proceedings in the suit instituted by the Appellants. The Appellants also proved that John Agnew and William Lyon, and the receiver, Henry Alexander, were dead, and that James Dashwood and William M'George were out of the jurisdiction of the Court of Chancery in

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Ireland. The Appellants also proved the execution of the trust-deed of the 20th of April, 1799, and that the Respondent was in the possession or beneficial enjoyment of the estates therein comprised.

The Respondent in Easter term 1830 filed his cross bill against the Appellants in the Court of Chancery in Ireland, in aid of his defence to the Appellants' bill, impeaching the considerations of the debentures held by the Appellants, and in respect of which they sued in the Court of Chancery in England, and insisting that all proceedings therein ought to be stayed, and the claims of the Appellants in respect of the debentures held by them set aside; to which bill the Appellants put in their answer; and issue being joined, witnesses were examined on the part of the Respondent, for the purpose of proving that the debentures held by the Appellants were improperly issued without due investigation by the trustees appointed by the trust-deed of the debts for which they were granted. William M'George, one of the trustees of the deed (a witness on behalf of the Respondent), proved that the trustees had investigated the demands for which such debentures were issued, and that the same had been investigated by the trustee William Lyon, as the solicitor of the Respondent, before the debentures were signed and delivered. This evidence was read on the hearing of the original cause. The causes came on to be heard together before the Lord Chancellor of Ireland on the 18th day of May, 1831, and several subsequent days, and stood for judgment until the 23d day of January, 1832, when his Lordship ordered and decreed that the Plaintiffs' bill should be dismissed without costs, but without prejudice to any proceedings they

might be advised to institute for the purpose of effectuating their demands; and in the cross cause, his Lordship also dismissed the Respondent's bill. The ground assigned by his Lordship for such decree was, that there was no jurisdiction in the Court of Chancery in Ireland to enforce or give effect to the decree of the Court of Chancery in England.

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For the Appellants, — Sir *Edward Sugden* and Mr. *Bethell*.

For the Respondent, — Mr. *Knight* and Mr. *Rolfe*.*

The Lord Chancellor. — This appears to me a case of very considerable importance, with a view to the general law in all parts of this empire, and proceedings in courts of law and equity as well as courts of appeal respecting the judgments of foreign courts. Upon one point the law is perfectly clear: the judgment of a court of record of the country where any action is brought is conclusive between the parties or privies to that record. It is equally clear that the judgment or decree of a court of record of a foreign country, or a court in the nature of a court of record, as they do not know the technical distinction which runs through our law in the constitution of courts here, dividing them into courts of record and not of record, may be made the ground of a proceeding in the courts of this country; and I take it to be a general law of all civilised countries, and to apply to Ireland, to Scotland, to the Colonies, and to

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* The case having been argued, stood over for judgment. See the authorities cited at the end of the report.

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foreign countries, just as it does here, — that the decree or judgment of a foreign court may be made the ground of a valid proceeding, and with fruit and effect, in each country. It is here the ground of an action in the nature of an action upon a simple contract, namely, an action of *assumpsit*; and one question which arises in this case, and which has been made a point of on both sides, is one which has been raised in some of our courts, in which there have been *dicta*, with some authority of judicial decision, but conflicting *dicta* upon the point, namely, whether it is only *primâ facie* evidence or ground of an action, or conclusive, not to be traversed or rebutted, and not to be averred against. The leaning of my opinion is so strong that I can hardly call it the inclination of an opinion; and we know it is the general sense of lawyers in Westminster Hall, (notwithstanding *dicta* of considerable weight coming from very learned Judges' *obiter dicta* to the contrary,) that the judgment of a foreign court in courts of this country is only *primâ facie* evidence — is liable to be averred against, and not conclusive. One argument is clear — that the law in the course of procedure abroad sometimes differs so mainly from ours in the principles upon which it is bottomed, that it would seem a strong thing to hold that our courts were bound conclusively to give execution to the sentence of foreign courts, when, for aught we know, there is not any one of those things which are reckoned the elements, or the corner stones of the due administration of justice, present to the procedure in these foreign courts. For example, I find in *Buchanan* and *Rucker**,

* 1 Campbell, 63. 9 East, 192.

where it was decided that it was not conclusive, it appeared that a sentence might be obtained without the appearance of a party, — that the notice was not required to be served upon him, — that it might be behind his back snatched against him : and is it to be endured in courts in this country, where justice is administered on more rational principles, that they should be bound conclusively, and without the power of looking into that matter, to give complete execution by their decrees or their judgment to a sentence so obtained ? I am assuming a case as to the course of procedure, but the whole principle of the law may be different, as in the law of Algiers, where we have a consul, and therefore recognise the existence of that state ; or in the law of Turkey, where we have an ambassador, and therefore recognise, still more strongly, its existence as a state, in which men are capable, according to the law of nations, of making contracts. But the law may be such, that it would be monstrous to hold that we were bound to give validity to its ordinances : for example, a man in Algiers or Turkey may have many wives, and according to that law, for aught I know, there might be some order or decree there, that the son of a second marriage, the first wife living, was the heir at law, to the exclusion of a daughter of the first marriage ; whereas our law would not recognise the existence of that second marriage ; and yet, according to the *lex loci contractus*, the second marriage is just as valid as the first. I give these as examples of the necessity there is for holding these foreign sentences not to be conclusive ; for what is law in the extreme case which I put may be law also in a case where the same absurdity does not

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arise, namely, as to sentences of our own colonies, or sentences in the courts of Ireland; and the same law must prevail. Both the cases which I have put clearly illustrate the expediency and the soundness of this view, which has always hitherto, in my judgment, been recognised as law in Westminster Hall: that the judgments of foreign courts are traversable, may be averred against, and are only *prima facie* evidence in actions to support which they are given in evidence. In *Walker v. Whitter**, this was held: in other cases it was also held. Lord Hardwicke, in a case† in the Court of Chancery in this country, said, — “that if he could not consider the judgment, or the decree of the Court of Great Sessions, which then exercised the jurisdiction of a Court of Equity in Wales, conclusive, he might ravel into it.” Upon this Lord Kenyon expressed his astonishment, and went so far as to say, that seeing this *dictum*, or rather judgment of Lord Hardwicke (for it amounted to a judgment), he was lost in a maze; he said, he did not know where he was, and he gave his opinion upon this matter that such a decree was conclusive, and not *prima facie* evidence only: but Mr. Justice Buller, notwithstanding, gave a very different opinion, and seems to adhere to the rule laid down by Lord Mansfield, in the case of *Walker and Whitter*. A *dictum* of Lord Ellenborough is the other way; that is founded upon his recollection of a *nisi prius* case, and therefore more in the nature of a *nisi prius dictum* than of a *dictum in Banc*: it was in the case of *Tarleton and Tarle-*

* 1 Douglas, 1.

† See *Galbraith v. Neville*, in a note to *Walker v. Whitter*, edit. by Frere.

ton*, and in that case I agree, because it was there held to be conclusive where it was collateral; but not conclusive would it have been if it had been sought to be enforced, as between the two parties themselves to the suit, and who had been the parties to the decree. Mr. Justice Bayley, in that case, distinctly took the objection, that the judgment cannot be ravelled into as between parties and a stranger, or a third party, where it is introduced as a collateral matter, because you cannot try innumerable issues; but if it had been between the parties themselves it might have been disputed: that is Mr. Justice Bayley's expression in *Tarleton v. Tarleton*, upon which Lord Ellenborough gave his opinion; for it was his recollection in *Banc*, of an opinion pronounced at *nisi prius*, in which he went so far as to say, that he did not sit as a court of error upon a foreign judgment in Guildhall: and accidentally applicable would that opinion be to this case, if it were collateral matter; but here the judge was sitting as a sort of a Court of Review to the extent of allowing the matter to be gone into, and the foundation of the decree to be examined as it were between the parties themselves, and not upon a matter collateral.

Such being my opinion, I have stated in the course of the argument that I could not hold this decree to be conclusive, and therefore I am of opinion it might well be inquired into in the court below. But for the same reasons I equally agree that the Lord Chancellor of Ireland was ill grounded in the view he took of the jurisdiction of that Court. There is authority for saying that a foreign decree may well be made the ground of a suit in another court.

* 4 Maule & Selwyn, 20.

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In *Martin and Nicolls**, in the year 1830, his Honor the present Vice-Chancellor even goes so far as to hold it conclusive. I have stated why I am of a different opinion; why I think that was ill decided in *Martin and Nicolls*; and therefore if it were ever to come before me for decision, I could not affirm that judgment, as at present advised, on the ground upon which it now stands; but at least it goes very far to show that that very learned and experienced Judge had no manner of doubt it might have been made the ground of a suit, though liable to be traversed.

The Lord Chancellor of Ireland, by the unfortunate view he took of the subject, that he had no jurisdiction, excluded all consideration of the merits of the decree here: the consequence is, that if a great number of the matters have been well decided and are wholly unimpeachable, and if one or two matters are impeachable, he is precluded from setting it right; he must reject it altogether, because he said he had no jurisdiction, and consequently he could not give the relief sought to any extent: the party might have a right to nine elevenths of the prayer being granted, although it is possible that one or two subordinate parts of the relief prayed he might have no right to. What he wants is a receiver, and that which protects the appointment of a receiver — an injunction to restrain Lord Donegal from interfering in the receipt of the rents in the hands of that receiver. That is the material part, and to that I am of opinion he is entitled. I agree with Lord Plunkett in thinking that they have not impeached the decree of the Court here. That is

* 3 Simon, 458.

his judgment: I may not perhaps think that in every part the decree is unimpeachable, but it is so in all the material features; and to the benefit of that decree, so far as regards the right to a receiver, and the right to an injunction to protect the receiver, I am clearly of opinion that the plaintiff is entitled. Agreeing with the Lord Chancellor of Ireland upon these grounds, it is unnecessary that I should enter into the principal reasons which support that opinion; it is only where we differ from him that it is necessary to assign these reasons. I have stated those grounds, and they are further sanctioned by the cases to which I have referred in the course of the argument, with which I shall not further trouble your Lordships.

It is said that it is doubtful, if not deniable, that the courts of equity here can appoint a receiver in a foreign country, or a foreign state. The practice of the courts is strong against this doubt, and in favour of the affirmative of the proposition. It is said that these cases passed *sub silentio*, and were not disputed: some of them certainly were disputed; in *Hibbert v. Hibbert** it was argued by counsel eminently qualified to deal with such a question, by Sir Arthur Pigott, a West Indian lawyer, as well as a great equity lawyer in this country: he puts his contention, and rests his resistance to the appointment of a receiver, not on the want of jurisdiction, but on another ground. So in the case of — *v. Lindsey* †, it was suggested that it was every day's practice to grant these receivers. In the case of *Hibbert v. Hibbert*, Sir A. Pigott argues upon no such ground as denying the practice or the competency of the jurisdiction; he rests his re-

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* 3 Meriv. 681.

† 15 Vesey, 91.

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sistance to the appointment of a receiver upon another ground. If he could have rested it upon the defect of jurisdiction, he would have done so, and Lord Eldon, the judge before whom he argued, would have recognised the practice. There are many other cases where the court has decreed a conveyance and a foreclosure of a mortgage: I mentioned one respecting Norman lands*; and there is a case relating to boundaries of lands in North America.†

All these cases shew that acting *in personam*, that is, through the medium of its power over the person, the courts of equity in this country mediately, though not immediately, affect the rights of real property abroad. They cannot immediately affect it, because their decree does not bind the land. If the principle which is contended for were true,—that they are conclusive before the court, because they are actually binding and of the force of judgments in the foreign country,—in that case, we could bind their land by a judgment here, and they could bind our land by a judgment there. That, I hold, for the reasons I have already assigned, is not law. The judgment therefore which I suggest to your Lordships to pronounce, is to reverse the decree as far as it dismissed the bill, and to declare that the court below has jurisdiction, but liable to opening the question before that court. I shall take time to consider whether I should go further, and make a declaration that the decree below was well founded, and ought to have been recognised and assisted by the decree of the Court of Chancery as far as

* Toller v. Carteret, 2 Vern. 494.

† Penn v. Lord Baltimore, 1 Ves. sen. 444.

regards the receivership and the injunction. I shall take time to consider whether I shall go so far, or only advise a remit with a view to further consideration, coupled with the declaration setting up the jurisdiction. If the Appellant is satisfied with a remit, I should prefer that mode of doing it; if he is not satisfied with a remit, and if upon reconsideration I think I cannot go further, he will undoubtedly have a right to be heard in reply: but I think I can go further, and the inclination of my opinion is that I shall, and then I shall request your Lordships to make that declaration, and to give the receiver, and an injunction. In the mean time, I move your Lordships to postpone the further consideration of the question.

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The *Lord Chancellor*.—I entered very much at large into my views of this case when the argument closed. The points put to your Lordships appeared to me to be very important. I stated, that it appeared to me quite impossible that I should accede to the proposition that a judgment in one country, pronounced by a court of competent jurisdiction, could be used in another, as conclusive of the matter. I stated my opinion, that the court was to deal with the question, and to see to the right decision of the case; and it appeared to me quite just, and I recommended you to adopt the principle, that a judgment was only *primâ facie* evidence of the right; that it was evidence, and might be the ground of proceedings in Chancery, as a foreign judgment may be the ground of an action of *assumpsit*, but was liable to be rebutted by evidence adduced by the party against whom it was pronounced. That appeared

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to me all that was necessary to dispose of that part of the question, and further than that I was not disposed to go. When I gave these reasons, I felt that I could not take the step of holding the judgment conclusive and not traversable; that the matter was not capable of being rebutted; that it was a question of deep importance to the administration of the law as well as equity in this country, and one upon which there was no case in terms decided; a question that has been the subject of some uncertainty of decision, and some conflict in *dicta*; and when the opinions of lawyers are not uniform and consentaneous, as considering the importance of the matter it is desirable they should be, I should have asked your Lordships before you adopted any principle of decision on this preliminary question, to have requested the assistance of the learned Judges, and to have had the case further argued by one counsel on a side. But on reflecting over the case, I do not feel it necessary to grapple with that question, and the view I first took is the one on which I repose with most satisfaction,—that a judgment may be given in evidence, and made the subject of proceedings in another court, or in a foreign country, or in a country that may be said to stand in the situation of the same country, acknowledging the same system, the same principles and laws, although it is another country; but that although it may be made the ground of that proceeding, it may be met by contrary evidence, and the subject matter of the judgment is liable to be inquired into.

In this case it is a decree of the Court of Chancery in England, which is made the ground of a suit in the Irish Court of Chancery. I agree with

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the Court, (not entering into the evidence) — that there is no reason for saying it was capable of being rebutted, and met by contrary evidence; there is no reason for saying that the decree was removed from the ground upon which it stood, and the judgment displaced by any evidence produced in the cause. So far I agree with the court below, and come to the same conclusion; but then his Lordship dismissed the bill, and dismissed it with costs, because he considered he had no jurisdiction. I have already referred to the statement I before made, to which I have nothing to add, as the ground of my clear and decided opinion, that so far your Lordships cannot agree with the Irish Court of Chancery—that so far you cannot follow the Lord Chancellor of Ireland: that, on the contrary, he ought not to have dismissed the bill, but to have entered into the suit, grounded as it was upon this judgment.

I stated to the counsel at the bar that I should even then, so clear was my opinion for the reasons I assigned, without any delay, have been disposed, if they had been content with that kind of reversal, to have reversed the order dismissing the bill, and sent the cause back to be fully proceeded in, with a declaration to that effect; but the Appellants, not unnaturally, seeing my bias against the decree, and also the strong bias of my mind as to the administration of the estates comprised in the trust deed, and the injunction to protect the Receiver of the Court, whose officer the Receiver is—seeing the bias I had against the principle assumed in the decree, and which induced them to think I should decide more in their favour, declined the qualified judgment; and I

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took time to look further into the case, to see whether there was any thing to displace the opinion which I had formed. Further consideration has confirmed my judgment of the case, and I am prepared to move your Lordships that the decree of the Irish Chancellor be reversed, and that it be sent back with this declaration : That there is jurisdiction—that the Court ought to have entertained the bill, and not to have dismissed it ; and so far as the appointment of a Receiver upon the estates, prayed by the bill, goes, and so far as granting the injunction to restrain the noble Respondent and the other persons, his agents, from interfering with the Receiver in the receipt of monies and other duties of his office, so far as the order for the Receiver, and so far as the issuing the injunction goes, which formed the substance of the suit, — that there is already, without any further inquiry, without any further procedure in the Court of Chancery in Ireland, sufficient ground for directing the Court to grant that part of the prayer of the bill. It is unnecessary, in order to accomplish the purpose of the Plaintiff, for himself and the creditors to go further than to grant that relief ; and it was clearly admitted that such was the purpose and object of the suit. It may be necessary to refuse other parts of the prayer of the bill : before the order is drawn out, I will again look into that part of the case ; but that is the substance of the order which I propose to make. I shall move it at a future time, but it may be satisfactory to the parties to know the substance of it. Of course there will be no costs ; as to the costs below, the bill having been dismissed with costs — these costs must be refunded, and no costs given. But as the Receiver appointed

by the English Court was interfered with by the Respondent, I am not prepared to advise your Lordships to make any order as to the costs below.

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It is ordered and adjudged by the Lords spiritual and temporal in Parliament assembled, that the decree complained of in the said appeal be, and the same is hereby reversed: And it is declared, that the bill filed by the Appellants in the Court of Chancery in Ireland, in the month of December, 1828, ought to have been entertained by that Court: And it is therefore ordered, that the decree of the Lord High Chancellor of Ireland, pronounced the 23d day of January, 1832, whereby that bill was dismissed, be, and the same is hereby reversed: And it is further declared, that the Appellants and the creditors of the Respondent, the Marquis of Donegal, entitled under the decree pronounced by the Vice-Chancellor of England on the 18th of June, 1827, ought to have the aid and assistance of the High Court of Chancery in Ireland, for carrying into effect the order made by the High Court of Chancery in England, whereby a receiver was ordered to be appointed of the estates comprised in the trust deed of the 20th of April, 1799: And it is therefore ordered, that it be referred to one of the Masters of the High Court of Chancery in Ireland, to appoint a proper person to be receiver of the rents and profits of the estates comprised in the said trust deed of the 20th April, 1799, and to allow him a proper salary for his care and pains therein, such person so to be appointed first giving security, to be approved of by the said Master, duly to account for what he

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shall so receive, and also to pay the same in such manner as the Court of Chancery in Ireland shall from time to time direct; and the tenants of the said estates are to attorn and pay their rents, as well those in arrear as those growing due, to such receiver, who is to be at liberty to let and set the said estates from time to time with the approbation of the said Master, as there shall be occasion: And it is further ordered, that an injunction be awarded by the said Court of Chancery in Ireland, to restrain the said Respondent, George Augustus, Marquis of Donegal, his stewards, bailiffs, and agents, from receiving or interfering in the receipt of the rents and profits of all or any part of the said estates comprised in the said deed of the 20th April, 1799: And it is further ordered, that the said Court of Chancery in Ireland do give all necessary directions consequential upon the appointment of such receiver and the awarding of such injunction as aforesaid, for passing the said accounts, and payment of the balances in the hands of the said receiver, in such manner as the said Court, upon hearing the parties, shall think fit to direct: And this House does further order, that the further consideration of the said cause, and also the consideration of all further directions of the costs of the proceedings in this suit, and under this judgment, be reserved to the said Court of Chancery in Ireland; and all parties are to be at liberty to apply to the said Court of Chancery in Ireland for the further hearing of the cause, &c.

In the course of the Argument of this Case, the following Authorities were cited:

AS TO JURISDICTION GENERALLY — 2 Will. 4. c. 33.; 4 & 5 Will. 4. c. 82.: Acts to make effectual the service of process

reciprocally in England and Ireland. *Kennedy v. Cassilis*, 2 Swan. note, 325. *Otway v. Ramsay*, 4 B. & C. 415. note. Seton's Decrees, and the Eq. Dr. Precedents of Appointments of Receivers in Ireland and the Colonies. Dict. of Sir A. Hart, in *Houlditch v. Donegal*, 1 Beatty, 404. *Hibbert v. Hibbert*, 3 Meriv. 681. *Roberdeau v. Rous*, 1 Atk. 544. *Comes Arglasse v. Muschamp*, 1 Vern. 75. and cases cited in the notes. *Earl of Kildare v. Sir M. Eustace*, 1 Vern. 405. *Penn v. Lord Baltimore*, 1 Ves. sen. 444. 454. (Belt's notes and Suppl.) *Ridgw. Ca. temp. Hardwicke*, 392. *Jackson v. Petrie*, 10 Ves. 164.

As to judgments, whether conclusive or only *prima facie* evidence—*Walker v. Witter*, Doug. 1., and in note to *S. C. Sinclair v. Fraser*, and *Galbraith v. Nevill*, *Philips v. Hunter*, 2 H. Blac. 402. *Tarleton v. Tarleton*, 4 M. & S. 20. *Martin v. Nicolls*, 3 Sim. 458. *Moses v. Macfarlane*, 2 Burr. 1012. *White v. Hall*, 12 Ves. 321. *Gage v. Bulkeley*, 3 Atk. 215. *Bayley v. Edwards*, 3 Swan. 703. And see the cases cited in arg. *White v. Parnter*, Knapp. P. C. C. 159. *Hamilton v. Houghton*, 2 Bligh, O. S. 169. *Collins v. Mathews*, 5 East, 473. *Harris v. Saunders*, 4 B. & C. 411. *Duchess of Kingston's Case*, 20 Howell's State Trials. See the opinion of the Judges, by L. C. J. DeGrey, p. 537. *Burrows v. Jamereau*, 1 Dick. 48.

Whether foreign judgments under foreign laws are to be examined on the same principle as judgments of countries where the same laws prevail as in England—*Buchanan v. Rucker*, 1 Camp. 63. 9 East, 192. *Cranston v. Johnson*, 3 Ves. 170. *White v. Hall*, *antè*.

That a decree in England might be pleaded to a similar suit in Ireland—*Foster v. Vassall*, 3 Atk. 589.; and see *Harrison v. Gurney*, 2 J. & W. 563.

See also *Plummer v. Woodburn*, 4 B. & C. 625. *Novelli v. Rossi*, 2 B. & A. 765. *Frankland v. M'Gusty*, 1 Knapp. P. C. C. 274. *Bouchier v. Taylor*, 4 B. P. C. 708. *Sidaway v. Hay*, 3 B. & C. 12. *Newland v. Horseman*, 1 Vern. 21. *Omychund v. Barker*, 1 Atk. 21. *Blackham's Case*, 1 Salk. 290. *Bluct v. Bamfield*, 1 Ch. Ca. 237. *Exp. Burton*, 1 Atk. 255. *Gahan v. Mingay*, Ridg. Lap. & Scho. Irish T. R. 53.

And for general law and authorities:—Story on the Conflict of Laws, c. 15.—On foreign judgments: Evans Pothier, Appx. No. 16.—On the authority of *Res judicata*: Park on Insurance, 7th ed. p. 520. Phillipp's Evidence, pt. ii. c. 2 and 3. Starkie on Evidence, pt. ii. § 67, 68.

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(COURT OF CHANCERY.)

ISAAC ROBINSON, surviving Administrator of the Estate of GEORGE ROBINSON, deceased - - - } *Appellant;*

DANIEL ALEXANDER, on behalf of himself and other the Creditors of the said Intestate, GEORGE ROBINSON - - - } *Respondent.*

A., in 1799, purchased shares in a ship, of G. R., who, having also shares in the same ship, was intrusted by A. and the other part owners with the whole management of the ship, and to keep the accounts relating to it from the time of the purchase until the ship was sold by G. R., with the consent of all the owners, in 1805. Upon the occasion of the sale, G. R. stated and settled accounts with W., one of the part owners, and paid him the balance due upon the earnings of the ship and the proceeds of the sale. In 1824 G. R. died.

Upon a bill filed by A. in March, 1826, for an account against the executors of G. R., it appeared by a ledger (found in a room wholly disused by G. R.) containing the accounts of the ship, that the credit and debit account between him and A. was not carried beyond 1805. On the debit side there were two items, one in 1811, and another in 1812. It appeared in evidence that A. left England in 1820, and some time after his departure his brother-in-law (a witness for A.) called several times upon G. R. with messages from A., and on those occasions asked him to come to a settlement with A. respecting the ship: that G. R. evaded the subject, but never stated that he was not indebted to A.

Under these circumstances an account was decreed against the executors of A., and that decree affirmed on appeal.

THIS was an appeal against a decree for an account, pronounced by his Honour the Vice-Chancellor of England on a bill filed by the Respondent.

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The bill, which was filed in the month of March, 1826, stated that the Respondent, in the month of October, 1799, purchased of the intestate, George Robinson, six sixteenth parts or shares of a ship called *The Volunteer*, for the sum of 1687*l.* 10*s.*; and in the month of November, 1799, the Respondent purchased of the intestate other two sixteenths, or one eighth part or share of and in the same ship, for the sum of 562*l.* 10*s.*: that the Respondent paid to the intestate the full amount of the purchase money for these shares; and bills of sale were duly executed to the Respondent, and all the regulations of the Ship Registry Acts complied with, so that the Respondent was fully and legally invested with the ownership of these eight sixteenth shares in the ship *Volunteer*: that George Robinson, the intestate, carried on business in Tower Street, in the city of London, as an insurance broker, at the time of the Respondent's purchase; and he (George Robinson), having also certain shares in the same ship, was entrusted by the Respondent and the other part owners with the whole management of the ship and the accounts relating thereto; and he undertook and agreed to act, and, in fact, did continue to act as managing owner of the ship, and kept all the accounts relating to the ship from the time when he and the Respondent so became joint owners up to the time when both he and the Respondent sold their shares in that ship: that during the period of such their

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joint ownership, the ship made considerable earnings, and the intestate, George Robinson, received all the proceeds of those earnings, which amounted altogether to a large sum of money, but he never accounted to the Respondent for his share of the earnings: that in the month of January, 1805, the intestate, George Robinson, with the consent of the Respondent and the other part owners, sold the ship for a large sum of money, and received on account of the Respondent, his (the Respondent's) share of the money produced by that sale, but died before he had accounted with the Respondent for the money received by him in respect of the sale and earnings of the ship: that on the occasion of the sale in 1805, the intestate stated and settled the accounts between himself and Mr. Wheeler, who was owner of one sixteenth share in the same ship during the period that the Respondent was owner of the eight sixteenth shares. On this settlement of accounts between Mr. Wheeler and the intestate, it appeared that there was due from the intestate to Mr. Wheeler, in respect of the earnings of the ship and proceeds of the sale, the sum of 141*l.* 17*s.* 4*d.* on account of Mr. Wheeler's one sixteenth share, and that balance was accordingly paid over by the intestate to Mr. Wheeler: that the Respondent was not informed of the fact of this settlement of accounts between the intestate and Mr. Wheeler: that from the time of the sale of the ship up to the time of the intestate's death, the Respondent frequently applied to him for an account of the earnings of the ship and the proceeds of the sale, but could never obtain it, although it was repeatedly promised by the intestate, even up to the time of his death: that in November,

1824, the intestate, George Robinson, died ; and in December, 1824, letters of administration of the estate and effects of the intestate were granted by the Prerogative Court of the Archbishop of Canterbury to his brothers, the Appellant Isaac Robinson, and John Robinson, since deceased, who possessed themselves of the personal estate and effects of the intestate to a large amount, and to an amount more than sufficient to pay his just debts, including what was due to the Respondent in respect of the matters aforesaid.

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The bill prayed, “ that an account might be
 “ taken by and under the direction of the Court
 “ of what was due to the Respondent in respect of
 “ the matters aforesaid, and that the Respondent
 “ might be paid what should be found due on
 “ settling that account ; and that, in case the Ap-
 “ pellant and the said John Robinson should not
 “ admit assets of the intestate, George Robinson,
 “ sufficient to pay his debts, including what should
 “ be found due to the Respondent in respect of the
 “ matters aforesaid, then that the usual accounts
 “ might be taken of the personal estate and effects
 “ of the intestate, George Robinson, received by
 “ the Appellant and the said John Robinson re-
 “ spectively, or either of them, or by their or either
 “ of their order, or for their or either of their use,
 “ and of the application thereof, and that the same
 “ might be applied in a due course of adminis-
 “ tration.”

The Appellants, by their answer, stated, that among the papers which came into the possession of the Appellant and John Robinson, upon the death of the intestate, were two letters, bearing date respectively the 10th day of June, 1799, and

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the 27th day of August in the same year, and written by the Respondent to the intestate, which contained some general proposals on the part of the Respondent to become concerned with the intestate in some engagement or speculation relating to shipping; and amongst other accounts contained in one of the books of account of the intestate (Ledger A.), was an account headed "Dr., Daniel " Alexander, Lawrence Pountney Lane, Contra " Cr.;" and by the said books of account it appeared that the Respondent and the intestate were respectively interested in the ship Volunteer from some time about the month of September, 1799, to some time about the month of October, 1804, and that the Respondent held eight sixteenth shares in the ship, and that the intestate held four sixteenth shares in and was the managing owner of the ship. By the same books it also appeared that the ship made certain freight, and that the same was received by the intestate, and that the intestate paid the outfit and expenses of the ship, and also the cost of certain investments or adventures in goods shipped on board her for or on account of the owners, and that upon two occasions, namely, after the ship's first and second voyages respectively, dividends were made and credited by the intestate to the owners of the ship in respect of her supposed or computed earnings: that in the account in Ledger A., so headed as aforesaid, which appeared to be a general account between the Respondent and the intestate, the sum of 185*l.* 1*s.* 5*d.* for the first of the said dividends is entered to the credit of the Respondent under date the 2nd of March, 1801, and a further sum of 692*l.* 0*s.* 8*d.* for the second of such dividends,

is in the same account entered to the credit of the Respondent, under date of the 1st of May, 1802, and various sums of money were, on the other hand, entered to the debit of the Respondent, as having been from time to time paid by the intestate to or for or on account of the Respondent: that the accounts of the three other and last voyages of the ship contained in the same books were not closed; but it appeared, by such last-mentioned accounts, although the same were incomplete, that the balance, upon the whole, was considerably against the owners of the ship: that by the same books it further appeared, that the ship was sold in or about the month of October, 1804: that the last item on the credit side of the account in Ledger A., headed as aforesaid, was as follows:—
“1805, January 29, by Sale Account of Ship Volunteer, 1306*l*. 7*s*.;” and the last item on the debit side of the same account was 200*l*. paid to or on account of the Respondent under date of the 27th April, 1805; and from the date of the last-mentioned entry, until the month of June, 1811, there was not a single entry in any book or paper belonging to the intestate from which it appeared that the Respondent and the intestate had any dealings or transactions in business together: that in another of the books of account of the intestate (Ledger B.) was an account headed “Dr., Daniel Alexander, Contra Cr.,” in which were two entries only, both of which were on the debit side thereof, and were dated respectively in the month of June, 1811, and in the month of May, 1812, but neither of which in any manner whatever related to the ship Volunteer, or to any of the matters in question in the cause in which the appeal was

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brought: that the account just mentioned was the last and (with the exception of the before-mentioned account in Ledger A., ending on the 27th April, 1805, and the entries in other parts of the books corresponding therewith,) the only account in the books and papers of the intestate in which the Respondent appeared to have had any concern whatever: that the intestate was, in the year 1779, and from that time until the year 1806, an insurance broker, in the city of London; and from the year 1800, to the time of his death, he held the office of Secretary to the London Dock Company: that some time in the year 1811, the London Dock Company took the house in New Bank Buildings, Princes Street, in the city of London, which was known by the name of "The London Dock House," and from that time the business of the company had been carried on there; from the same period, also, until his death in the month of November, 1824, the intestate in his character of secretary to the company resided in the said house, and occupied the whole thereof as his residence, except the ground floor: that when the intestate first went to the London Dock House, a small back room on the ground floor was fitted up as an office for him, as secretary to the company, but he transacted business in that room four or five times only at the very commencement of his residence in the house, after which, finding the room dark and inconvenient, he discontinued the use of it altogether: that the said back room, from the time when the intestate ceased to use it until the year 1813, or 1814, was used only as a lumber room for depositing boxes and papers; and from the year 1813, or 1814, the said room was used as

a lumber room for the purposes before mentioned, and also as a porter's or messenger's room for the servants of the company : that it did not appear that the intestate ever entered the before-mentioned room after the year 1812, for at least eight or nine years before his death : that on the day of the death of the intestate, the Appellant and John Robinson requested their solicitor, Mr. John Teesdale, to meet them at the London Dock House, for the purpose of searching amongst the papers of the deceased, to ascertain whether he had made a will ; and the Appellant and John Robinson and Mr. Teesdale met by appointment at the London Dock House accordingly on the day following for that purpose : that in the course of their search many books and papers relating to the affairs of the intestate, and which referred to matters of modern date, were found in those parts of the house which the intestate inhabited or used ; some of them were found in the drawers of a writing-table, in the court room, which the intestate constantly occupied, and transacted business in, up to within a few weeks of his death, others were found in different parts of the same room, and others in the intestate's bed-room : that in prosecuting such search, the attention of the Appellant and the said John Robinson and Mr. Teesdale was directed to a wardrobe in the before-mentioned back room ; — the lower part of this wardrobe consisted of drawers, which were unlocked, and in use by the porters and messengers of the company who occupied the room, but the upper part was locked ; and the keys of the intestate having been examined, and such of them as appeared likely to fit the lock having been applied to

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it and tried, but without success, the Appellant and the said John Robinson and Mr. Teesdale caused the doors to be forced open. The interior of that part of the wardrobe was fitted up with shelves, upon which all the books of account containing any entries relating to the ship Volunteer, together with sundry policies of insurance, vouchers, documents, and papers, also relating to the said ship, were found; and the quantity of dust and dirt with which the same were covered was so great, and the whole appearance of the interior and of its contents was such as to make it certain that it must have been closed, and that none of the books and papers contained therein could have been referred to, or even touched for a great many years: that none of those books contained any entry relating to the said ship of a date later than the 21st of July, 1806, and none of the said policies, vouchers, documents, and papers, relating to such ship, were of a later date; and none of such books (the whole of which appeared to relate to by-gone transactions) contained any entry whatever of a later date than the month of June, 1815.

The Appellant and John Robinson, by their answer, also insisted that from the state of the accounts of the ship's last three voyages, and of the Respondent's first-mentioned account, and other the circumstances therein mentioned, and particularly inasmuch as no charge was made to the debit of the Respondent in the first-mentioned account, for his share of the losses, outgoings, and expenses, appearing by the accounts to have been sustained and expended, the true state of account between the Respondent and the intestate upon the close of the speculation relating to the ship could not pos-

sibly be now ascertained by reference to the accounts before mentioned; but that if the same could in any manner be ascertained by reference to such accounts, they believed that it would either appear that the said account had been long since finally balanced and the balance paid, or that such balance was against the Respondent, and in favour of the intestate: that from the time when the Respondent became (as he alleged) interested in the ship, down to the time of the intestate's death, the Respondent and the intestate were and continued to be upon the most intimate and warm terms of friendship, and that for more than twenty years of that interval the Respondent and the intestate were in constant personal communication with each other, the intestate being secretary to the London Dock Company, and the Respondent being architect of the same company; and that, as appeared by letters and copies of letters in the possession of the Appellant and the said John Robinson, the Respondent and the intestate when absent were in the habit of corresponding by letter on their private concerns, in the most confidential and unrestrained manner, down to the time of the death of the intestate: that from the knowledge which they had of the general character and integrity of the intestate, and of his highly independent disposition he was a most unlikely person to permit a pecuniary demand on him to remain undischarged, or any account on which it was probable that he would be found a debtor to remain unsettled; and they therefore insisted that all accounts between him and the Respondent had been long since settled, and that nothing was due or owing to the Respondent from the intestate at the time of his

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death; and they submitted that all accounts between the Respondent and the intestate ought, under the circumstances aforesaid, to be considered as closed and satisfied.

The Appellant and John Robinson, by their answer, further insisted, that if the Respondent ever had any cause of action or suit against the intestate for or concerning any of the matters in the bill mentioned, which they did in no sort admit, such cause of action or suit accrued or arose above six years before serving or suing out process against the Appellant and the said John Robinson, to appear to and answer the said bill; and that the Respondent had not at any time since the said cause of action or suit, if any, arose, been under any disability to commence or prosecute the same; and that the intestate did not, as the Appellant and the said John Robinson believed, at any time within six years before exhibiting the said bill of complaint, or serving or suing out such process as aforesaid, to their knowledge or belief; nor had the Appellant and the said John Robinson, or either of them, at any time, or in any manner, admitted or promised to pay the Respondent's alleged claim, or any claim in respect of the matters in the bill mentioned, or any of them; and they claimed the benefit of the act of parliament made and passed in the twenty-first year of the reign of his Majesty King James the first, intituled "An act for limitation of actions, and for avoiding of suits in law."

Three witnesses were examined on the part of the Respondent, and two on the part of the Appellant and John Robinson.

Mr. John Teesdale, the Appellant's solicitor,

was the first witness on the part of the Respondent. In his deposition to the second interrogatory he proved seventeen different books as exhibits, marked respectively with the first seventeen letters of the alphabet. The first three of them are books marked with the letters A, B, C, and were stated by the witness to appear to be, and that he believed them to be, ledgers which were kept by the intestate in his lifetime, and a fourth marked with the letter D, a journal kept by the intestate in his lifetime. The other books were cash-books, bankers' pass-books, a book of bills payable and receivable, a letter-book, and policy-book, all kept by the intestate in his lifetime.

The witness further stated, he believed that all the said several produced books did belong to the intestate in his lifetime, and at the time of his death; and further, that the several produced books had been for a considerable time past in the possession or custody of him, the witness, as the solicitor of the Appellant and the said John Robinson, and they then came from the office of the witness, situated in Fenchurch Street, in the city of London; and that the said several books (except as to the pass-books) did appear to the witness to have been, and he believed they were, kept by the intestate himself, the entries therein chiefly appearing to have made by him, the intestate; and that he, the intestate, kept the whole of the produced books in his own custody, at the London Dock House, situated in New Bank Buildings, in the city of London, where he resided for many years before and up to the time of his death, and that such books were so as aforesaid kept for the intestate himself, and on his own account; and the witness further said,

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that he, the witness, had looked upon the folio 34 of the produced book marked A, and upon folio 42 of the produced book marked B, and also upon folios 27, 66, 107, and 124 of the produced book marked A, and that the accounts now appearing written on those folios respectively were written in the lifetime of and for the intestate, and were written by the intestate, as witness believed as to the hand-writing, he, the witness, having, in the lifetime of the intestate seen him (the intestate) write many times, and being well acquainted with his manner or character of handwriting; and further, that the several accounts on the said folios 34 of the book marked A, and 42 of the book marked B, were and are accounts between the Respondent and the intestate, and relate to dealings and transactions between them; and that the several accounts on the said folios 27, 66, 107, and 124, of the book marked A, were and are accounts between Charles Wheeler and the intestate, and relate to dealings and transactions between them the said Charles Wheeler and the intestate.

The following is the account, as proved by this witness in the produced ledger marked A, folio 34, and the produced ledger, marked B, folio 42:—

Dr.	D. ALEXANDER, Lawrence Pountney Lane.				Contra Cr.			
	1799.	1800.	1801.	1802.	1803.	1804.	1805.	1806.
1799. Nov. 20.	To bill of sale, ship Volunteer for 8 16th parts	£ 3 3 0	£ 250 0 0	1799. Sept. 14.	By cash	-	-	£ 1500 0 0
1800. March 24.	premium 2400 ditto	-	381 0 0	Oct. 19.	ditto	-	-	187 10 0
July 11.	paid Wheeler half pipe port wine	39 11 9	1800. July.	Nov. 1.	ditto	-	-	112 10 0
Aug. 31.	premium 2600 Volunteer	-	213 2 6	11.	ditto	-	-	600 0 0
1801. May 15.	wine account	-	6 19 3	1800. Nov. 18.	ditto wine	-	-	39 11 9
1802. Jan. 18.	premium 2400 Volunteer	-	308 8 0	Dec. 31.	ditto	-	-	500 0 0
Nov. 4.	paid T. Wake	-	37 17 3		return prem. ship Volunteer, } 255 10 0			
April 28.	cash paid him	-	500 0 0		2400 at 11l. 3s. 4d. per cent. }			
1802. Jan. 18.	ditto	-	124 19 4	1801. March 2.	dividend ship Volunteer	-	185 1 5	
Nov. 4.	duties on stone	-	11 2 2	May 5.	duties on stone	-	11 2 2	
1803. Jan. 18.	cash paid him	-	450 0 0		return pm. Volunteer 2500 }			
Nov. 4.	ditto half pipe port	-	24 18 10	June 24.	3 per cent.	-	75 0 0	
Aug. 27.	ditto T. Hullah	-	28 14 1	Aug. 31.	cash	-	500 0 0	
1804. March 8.	ditto Mr. Robert	-	500 0 0	1802. May 1.	interest	-	12 10 0	
1805. March 14.	ditto Arts, &c.	-	2 2 0	1803. Jan. 29.	return premium 2400	-	96 0 0	
April 27.	ditto Lewis	-	41 1 0		dividend ship Volunteer, 8 16ths	692 0 8		
1811. June 26.	ditto him	-	200 0 0		sale account, ditto	-	1306 7 0	
1812. May.	To cash, stone for Lord Romney	21 5 0						
	Arrowsmith's map	-	5 5 0					

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Mr. Thomas England, the second witness for the Respondent, in answer to the second interrogatory, proved all the books produced by the preceding witness, and said that the whole of the said books belonged to the intestate, George Robinson, in his lifetime and at the time of his death, and that part of the writing in the said books appearing to him (the witness) to have been written by the intestate, he (the witness) believed the whole of the said books were, in the lifetime of the said intestate, kept by, and for, and on account of him, the intestate, for the purpose of settling his accounts with his correspondents; and further, that he (witness) had looked upon the folio 34 of the book marked A., and upon the folio 42 of the book marked B., and upon folios 27, 66, 107, 124, of the book marked A., and that the several accounts appearing written on those folios respectively were all in the handwriting of the intestate, as the witness believed, he (the witness) having several times in the lifetime of him, the intestate, seen him write, and being well acquainted with his manner or character of handwriting, and therefore the witness believed they were written in the lifetime of the intestate, and for him, the intestate; and that the accounts written on the said folio 34 of the book marked A. relate to *the mercantile dealings* between the Respondent and the intestate; and that the said accounts in the others of the said folios relate to mercantile dealings between Charles Wheeler and the intestate.

In answer to the third interrogatory, the same witness stated, that he had again looked at folio 34 of the produced book marked A., and that there appeared, by the account there stated, and the witness

believed, that there was a balance of 950*l.* 4*s.* 10*d.* due from the estate of the intestate, George Robinson, to the Respondent; and further, that he, the witness, had inspected and examined the two several produced books marked respectively A. and B., also the produced books marked respectively E., F., G., H., and I., the last-mentioned five books being the intestate's banking books; and that he so inspected and examined the said books marked respectively A. and B., for the purpose of ascertaining what balance was due from the intestate to the Respondent, the Appellant and the said John Robinson having refused to furnish an account of the transactions between the intestate and the Respondent; and finding that there appeared to be a balance of 950*l.* 4*s.* 10*d.* due to the Respondent from the intestate, George Robinson, by the accounts contained on folio 34 of the book marked A., he, the witness, examined the books marked respectively E., F., G., H., and I., for the purpose of ascertaining whether or not the intestate had made any other payments than what appeared on the said folio 34 to the Respondent, and no such payments could there be found to have been made; and the witness did not discover that the said balance or sum of 950*l.* 4*s.* 10*d.* had been paid or satisfied in part or the whole; and the witness further said, that he had again looked upon the said folios 27, 66, 107, and 124 of the book marked A., and that on the said folio marked 27 there were entries of charges for insurance on the ship Volunteer, and of the cost of one sixteenth part or share of that ship; and that on the said folio 66 there were entries of sums charged for insurance, and of a credit for a dividend on the said ship; and that

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on the said folio 107 there was an entry of a credit for another dividend on such ship ; and on the said folio 124 there was an entry of credit for the sale of the same ship ; and that it appeared by the said entries, that a sum of money was due to Charles Wheeler, for or in respect of the said ship Volunteer, but not how much was so due ; and that the accounts in the said folios related to a great number of other adventures and mercantile transactions besides that of the said ship Volunteer ; and that it appeared by the book marked A., that the intestate was engaged in adventures and mercantile transactions with several other persons besides the said Charles Wheeler and the Respondent ; and further, that it appeared by the said book marked A., that the intestate was at the time of his death indebted to the Respondent in the sum of 950*l.* 4*s.* 10*d.* upon the ship Volunteer's account, and some few cash transactions.

In answer to the fourth interrogatory, the same witness stated, that the intestate, George Robinson, was engaged in the business of a merchant, ship-owner, and insurance broker ; and that he was at the time of his death, and had been from the first establishment of the London Dock Company, secretary to that company ; and that the intestate died about two years since, as the witness best recollected as to the time ; and that the intestate was for many years prior, and down to the time of his death, upon terms of intimate acquaintance and friendship with the Respondent ; and that it appeared by the produced books, marked respectively A. and B., that the Respondent had dealings and accounts with the intestate relating to the ship Volunteer, and cash matters from the year 1799 to

the year 1812, both inclusive; and the witness further said, that the Respondent was by profession an architect during the said last-mentioned period, but that he did not then follow or exercise any profession or business.

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In answer to the fifth interrogatory, the same witness stated, that in the year 1820, the Respondent was, from ill health, obliged to leave this country, and in consequence of his not being expected to recover, witness, as his brother-in-law, undertook to arrange all his, the Respondent's, affairs. That some short time after the Respondent so left this country, he (the witness) called several times upon the intestate with messages from the Respondent, and took the opportunity of asking the intestate to come to a settlement with the Respondent respecting the ship Volunteer; and that the last time when the witness saw the intestate, respecting the account between him and the Respondent relating to the said ship, was a few months before the death of the intestate, as witness best recollected as to the time; and that the witness did generally, on the said occasions, ask the intestate respecting a settlement of the said account, and the intestate generally evaded the subject, but he, the intestate, never did state or say, or intimate to witness, or in his presence, or to his knowledge, that he, the intestate, was not indebted to the Respondent, or to any such effect.

Mr. Charles Wheeler, the third witness examined on behalf of the Respondent, in answer to part of the third interrogatory, verified the account in the produced book marked A. between himself and the intestate, relative to the ship Volunteer; and in answer to the fourth interrogatory, he stated

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that the intestate was in his lifetime by profession an insurance broker and underwriter, to the best of witness's knowledge; and he was also clerk to William Vaughan, of London, merchant; and that he, the intestate, was such clerk in the year 1799, and continued so until some time in the year 1800, when he was appointed secretary to the London Dock Company, and he continued to be such secretary up to the time of the death of him, the intestate, which happened on the 13th day of November, 1824; and from the month of March, 1803, to the month of March, 1804, the intestate was engaged with witness and James Clements, in the trade of coal-merchants, as appeared by the produced book marked A.; and from what witness heard the intestate say, he (the witness) believed that the intestate was, from the month of October, 1805, to the month of January, 1806, engaged with Jervase Jackson, of London, in the business of policy brokers; and that the intestate was upon terms of intimate acquaintance and friendship with the Respondent; and that the Respondent had dealings and transactions and accounts with the intestate relating to the ship Volunteer, from the year 1799, when the said ship was purchased, down to the time of the sale of the said ship, in the month of January, 1805, and also respecting the building of the London Dock, and the warehouses belonging to the same, from some time about the year 1795, down to the time of the death of the intestate; and that the Respondent was by profession an architect and surveyor in the year 1799, and in each of the years from that time down to the said year 1812 inclusive.

The substance of the depositions of the two

witnesses examined on behalf of the Appellant and John Robinson, showed (as set forth in the answer) that the intestate's books, proved on the part of the Respondent, had been found after his death in a room which the intestate had for some time previous to his death given up using as a place of business, and that some of the books appeared to have been untouched for several years.

On the 21st July, 1890, the cause came on to be heard before his honour the Vice-Chancellor, when a decree was made, by which it was referred to the Master to take an account of all dealings and transactions between the Plaintiff (the Respondent) and George Robinson, relating to the matters in the Plaintiff's bill mentioned.*

* The case in the Court below is not reported. The observations in delivering judgment were as follows:—

The Vice-Chancellor.—This appears to be a mercantile transaction arising between Robinson and Alexander, and though there would be a presumption that the account was settled, from the circumstance of there having been nothing done since 1812, and from the nature of the transaction making it probable that it would not be allowed to remain in a state of sleep, yet it does appear to me, that when we are considering what is the presumption of fact, the matter of evidence given by England is very important, because, when he takes the opportunity of asking him whether he had settled the account, Robinson, by the conduct he adopts upon the occasion, supports the inference that the account had not been settled. If Robinson had settled that account he would have said I have settled it and paid it. But, on the contrary, he evaded the application, and he never says it had been settled. The observations made upon Lord Tenterden's Act are quite immaterial, because Lord Tenterden's Act can only apply where there has been a previous bar by the Statute of Limitations; and it appears to me, therefore, upon this case, that the Plaintiff is entitled to an account; with respect to the question which Sir W. Horne proposes, whether it should be 900*l.* or the 1300*l.*, the Master is to take an account.

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The appeal was against this decree.

For the Appellants, Sir *W. Horne* and Mr. *Wigram*.

For the Respondents, Mr. *Knight* and Mr. *Stuart*.*

2d June.

The Lord Chancellor. — My Lords, the course which I shall propose to your Lordships to adopt, is naturally suggested to me by the line of argument, and by the importance of the points which have been made at the bar.

On the first point, namely, how far the circumstances of this case justify the Court in presuming satisfaction or payment from the lapse of time, I see no reason to hang much doubt, or to form any opinion different from that which his Honour has come to upon this part of the case.

But as to the other point, which is the principal one raised, namely, the application of the statute of limitation, or rather the exception of merchants' accounts in the enacting, or operative part, of that statute which has been laboured at your Lordships' bar, I should wish to have further time for consideration. It is a matter which has been made so little the subject of solemn decision, that, as at present advised, I should wish to have an opportunity of conferring with some of the learned Judges of the Common Law before I finally make up my mind to advise your Lordships to agree with his Honour the Vice Chancellor. With that view, and for the purpose of giving that opportunity, I should propose to your Lordships to

* See authorities cited in the judgment and at the end of the case.

postpone the consideration of this case for a few days, and if there prevails any doubt, or if I should find a more recent decision since I left that side of Westminster Hall, affixing another and more definite meaning to that clause than it has hitherto had, if my present degree of doubt should continue on further consideration, I should be then disposed to call on your Lordships to hear the case re-argued before the learned Judges, by one counsel on each side, before finally deciding this case; not at present saying that that will be the conclusion I shall come to, but throwing it out merely for consideration. In the mean time, I move your Lordships, that the further consideration of this case be adjourned.

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Very considerable doubt hangs over the decision of *Barber v. Barber**, not over the authority of the learned Judge by whom it is represented to have been pronounced, but over the report itself. I am undoubtedly the last person in the world to attach any doubt to so high an authority, but that doubt hanging over the case as reported, and inasmuch as it is *ex relatione*, and there being a very meagre and scanty account of the circumstances as well as of the argument (the point is made in the last paragraph of the report as to the exception of the statute applying to merchants' accounts), and then, as it appears in the report, his Honour having disposed of it in very short, summary, and somewhat general terms, I should wish to examine that case further. At present, therefore, holding that that case is not of the highest authority, and feeling great doubt of the accuracy of the report, especially when we

* 18 Ves. 286.

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find that neither Lord Eldon in his judgment, nor the counsel on either side, press that authority into their argument in the case of *Forster v. Hodson**, although in all probability it was published, and at all events Sir Samuel Romilly and his coadjutors had not at that time ceased attending at the Rolls, and Sir S. Romilly was in the case at the Rolls and must have been aware of it.—For these reasons and with these views, I shall beg your Lordships to postpone the further consideration of this case.

9th July.

The Lord Chancellor. — This case arises upon a question respecting shares in a ship, a transaction originating in the purchase of six sixteenths, and subsequently of two more sixteenths, amounting in the whole to eight sixteenths of the ship: it was a question of account involving two points; one of the points was, Whether the lapse of time and other circumstances entitled the Court to presume payment? the other was, Whether the statute of limitations, which was set up, operated in the same direction, and whether or not (the Respondent being within the exception) the statute of limitation barred the suit?

I stated at the time of the argument that upon the first of these questions I had no doubt; I considered that, under the circumstances, the lapse of time (and so the Court below thought) did not entitle the House to presume satisfaction or payment.

The second of these points was the one upon which in regard to its importance some difference of opinion had existed, particularly as to the case of *Barber v. Barber*, a decision that has been a

* 19 Ves. 180.

good deal doubted, and a good deal commented on here, if not elsewhere. I considered that it was fit to stand over for further consideration, and I mentioned that should I entertain a doubt on that point, the importance of the question, and the frequency of its recurrence at law more than in equity, would incline me to obtain the opinion of the Judges, and to have the case re-argued before them by one counsel on a side: I have since had some conversation with some of these learned persons, I have re-considered the case, and the inclination of my opinion as it was at the time of the argument has been confirmed. I therefore advise your Lordships now to affirm, without costs, the judgment of his Honour in the Court below. It was fit for consideration. The argument is fully stated, and the doctrine laid down with great distinctness, by Mr. Serjeant Williams, in one or more notes, — note *A.* and *B.* to the case of *Webber v. Tivil*, 2 *Saunders*, 127. Both those notes give a very distinct statement of the cases on the subject, and regard being had to these cases, and the opinion of Lord Kenyon, which is distinctly given in one of them, I am of opinion that his Honour came to a sound conclusion upon the second, as he had done upon the first point raised in this case, and that the party being within the exception of the statute, the suit is not barred by the statute of limitations. I am confident that if an action at law had been directed to be tried, and sent to a court of law on this point, there would have been under the circumstances no doubt. I therefore recommend your Lordships to affirm this judgment without costs.

Judgment affirmed without costs.

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Note.—See *Bridges v. Mitchell*, Gilb. Eq. Rep. 224.; Bunb. 217.; a case upon length of time and acquiescence. *Welford v. Liddel*, 2 Ves. 400. The argument in *Duff v. The East India Company*, 15 Ves. 198. *Crawford v. Lyddel*, cited 6 Ves. 382. *Dict.* of Kenyon C. J. in *Catling v. Skoulding*, 6 T. R. 193. See also *Jones v. Pengree*, 6 Ves. 580. Serjt. Williams's note to *Webber v. Tivil*, 2 Saund. 121., under the name of *Webber v. Tyrrel*. 1 Levinz. 286. S. C. According to the doctrine, apparently established by the authorities, a stated account is not within the exception of, but is barred by, the statute; otherwise if it is not ended but open. *Sandys v. Blodwell*, Sir W. Jones, 401., in which, upon a reference to the Judges from Chancery, they certified that the statute was no bar, because the account was not final, and also that it was between merchants. *Martin v. Delbo*, 1 Sid. 465.; S. C. 1 Mod. 70.; 1 Vent. 89.; 1 Lev. 298. In this case it was held that, after an account stated, it is not within the exception of the stat. 21 Jac. c. 16. *Farrington v. Lee*, 2 Mod. 311, 312.; S. C. 1 Mod. 268. 1 Freeman, 229. 234. 242. under the name of *Harrington v. Leech*. *Chieoly v. Bond*, 4 Mod. 105.; Carth. 226.; 1 Show. 341. S. C. *Scudemore v. White*, 1 Vern. 456. *Sherman v. Sherman*, 2 Vern. 276., a case upon time and acquiescence. *Cranch v. Kirkman*, 1 Peake's N. P. 120. 164. If a factor refuses to account, an action of *assumpsit* lies, and the statute runs from the time of the refusal; *Topham v. Braddick*, 1 Taunt. 572. See *Jolliffe v. Pitt*, 2 Vern. 694. *Sherman v. Withers*, 1 Ch. Ca. 152. *Sturt v. Mellish*, 2 Atk. 610.; and the note to *Jones v. Turberville*, 2 Ves. jun. 15.; Bull. N. P. 149.

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His Majesty's ATTORNEY-GENERAL,
 at the relation of EDWARD, Lord
 SUFFIELD, and ALEXANDER NOW-
 ELL, Esq. - - - - } *Appellants;*

The Principal and Scholars of King's
 Hall and College of Brazen Nose,
 Oxford, Governors of the Free
 School of Queen Elizabeth, in
 Middleton - - - - } *Respondents.*

By letters patent in 1572, Queen Elizabeth, upon the prayer of Alexander Nowell, dean of St. Paul's, restored and founded the free grammar school of Middleton, in Lancashire, providing that the principal and scholars of Brazen Nose College in Oxford, should be governors of the school, who were incorporated by the name of governors, &c., and that there should be of her own foundation six scholarships, to be filled by scholars from Middleton School, to be nominated by Dean Nowell as long as he should live, and at his decease by Brazen Nose College and their successors, with licence to Dean Nowell to erect seven other scholarships, to be filled by scholars chosen from Middleton School, if so many fit scholars could be found therein, or, in default, from such other schools as therein mentioned; and power was given to Dean Nowell to fix the stipends to be paid to the scholars; and to him and the college successively to make statutes and ordinances for the governance of the masters of the free-school and of the scholars in the college and their stipends respectively, and for the preservation and disposition of the rents and revenues for the support of the school and scholars. The letters patent then set forth the gift of certain rents by the queen to the college, to hold to them and their successors, as governors of the school, "*ad proprium opus et*

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usum eorundem principalis et scholarium ejusdem Aulae Regiae et Collegii de Brazen Nose in Oxon' Gubernatorum liberæ scholæ predictæ, &c. Ea tamen intentione quod ex præmissis per præsentis præconcessis et ex aliis terris, &c. imposterum ad usum liberæ scholæ, &c. dandis, &c. iidem, &c. gubernatores, &c." should pay an annual stipend of twenty marks to the master of the school, and ten marks to the under-master, &c.

By letters patent, dated in 1579, Queen Elizabeth granted to the college, as governors of the free school, the manor of Upbery, &c. (which had been vested in her by the grant of Dean Nowell), to hold, &c. in mortmain, &c., and she willed that the principal and every one of the fellows should take an oath that they would *pay over (impendent)* the rents, &c. of the manor, &c. in all times to come, as follows; namely, every year to each of her thirteen poor scholars elected out of her free-school of Middleton, &c., *for their support (ad ipsorum victum)*, 3*l.* 6*s.* 8*d.*, &c., and 6*s.* 8*d.* every week, for the improvement of the commons of the college. Moreover she willed that any principal and fellow at the time of his election and admission in future, separately should take an oath at the public assembly of the fellows of the college, that they would *expend (impendent)* the rents, &c. for the purposes aforesaid; and as often as any fellowship should be vacant, would choose and admit (such fellow) from among her said scholars, who should either be superior or equal to the other competitors in erudition, probity of conduct, or piety.

The funds for the support of the institution were provided chiefly by Dean Nowell, and they exceeded (by 1*l.* 10*s.*) in amount the provisions made by the letters patent for the master, under-master, and scholars of the free-school. It appeared, also, that Dean Nowell, during his lifetime, had permitted the surplus of the revenues, beyond what was applied for the use of the school, to be appropriated to the use of the college. In the year 1712, the thirteen scholarships were consolidated into one; the school fell into decay; for many years no scholar had been elected from it to Brazen Nose; and the bulk of the revenues of the charity, which had increased to a very great extent, had been applied to the use of the college.

Held, under the circumstances, that this application of the funds was legal.

THE information in this cause was filed by the Attorney-General, in the Court of Chancery, against the Respondents, on the 18th of June, 1827, to obtain the decree and directions of the Court for the better maintenance and augmentation of the free school of Queen Elizabeth, at Middleton, in the county of Lancaster, founded by the letters patent herein-after mentioned; and for the application of the surplus rents, and the fines arising from the charity estates in question in the cause.

The case stated by the information was in substance as follows:—That by letters patent, under the great seal of England, bearing date on or about the 11th of August, 1572, and in the fourteenth year of Queen Elizabeth, after reciting that Alexander Nowell, clerk, dean of the Cathedral Church of St. Paul's, London, on the part of her faithful subjects dwelling in the parishes of Middleton, Preswick, and Oldham, in her county palatine of Lancaster, and in other villages and places in the same, neighbouring and adjoining, had humbly prayed that, whereas within the village or parish of Middleton aforesaid, a certain grammar school anciently held and used, then, from the smallness of the stipend of the head master or pedagogue of the same, had been deserted, and almost reduced to nothing, she, for the re-establishing the same school, and also for the better information, instruction, and education in literature of boys and young men dwelling in Middleton aforesaid, and the other places aforesaid thereunto adjoining, should think fit to erect, found, and establish a certain free and perpetual grammar school, which should last for

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ever, constantly in the same village of Middleton, it was witnessed, that she, of that singular care which she had for the pious and liberal bringing up of the youth of her kingdom, and of the benevolence with which she cultivated literature, which was of the greatest assistance in imparting and cultivating virtue, and the pursuit of science as well as the followers thereof, to that supplication freely and graciously assenting, of her special grace, certain knowledge, and mere motion, for her, her heirs and successors, did will, grant, and ordain, that, by virtue of those her letters patent, there might and should be for ever, within the aforesaid village and parish of Middleton, a certain free and perpetual grammar school, for the education and instruction of youth therein, and in the neighbouring places dwelling, in grammar, which should remain for ever, and be called the Free School of Queen Elizabeth, in Middleton; and her Majesty did found and establish that school to continue for ever, with one master or pedagogue, and one under master; and she did ordain and constitute Edmund Ireland, first and then present master or pedagogue of the aforesaid school; and whensoever, and as often as, by the death of the said Edmund Ireland, or in any other manner whatsoever, the office or place of master or pedagogue should in future become void, her Majesty willed and ordained that then and so often the aforesaid Alexander Nowell, during his life, in the manner therein mentioned, should nominate and appoint; and after the death of the said Alexander Nowell, the principal and scholars of King's Hall and College of Brazen Nose, in Oxford, and their successors, or the principal and the majority of

six senior scholars, fellows of the same King's Hall and college for the time being for ever, in the manner therein mentioned, should choose and appoint a man, honest, learned, and fit for the office of master or pedagogue of the free school aforesaid: Also her said Majesty did make, nominate, constitute, and incorporate, the said Edmund Ireland as present master of the free school aforesaid, and his successors when so nominated or elected and appointed as masters or pedagogues of the free school aforesaid, in form aforesaid, as master and masters thereof for ever; and that the said Edmund Ireland and his successors, masters or pedagogues of the free school aforesaid, might and should be one body corporate in themselves in deed and name, by the name of the Master of the Free School of Queen Elizabeth, in Middleton, and that by the same name they might plead and be impleaded, and every of them might so do in all courts: And that the said Alexander Nowell from time to time during his life should nominate a learned and fit man to the office and place of under master of the free school aforesaid, and should present him to the master of the free school aforesaid for the time being, by his writing, sealed with his seal; And as often as, and whensoever after the death of the aforesaid Alexander Nowell, the office or place of under master of the free school aforesaid should in any manner become void, that then and so often the aforesaid principal and scholars of King's Hall and College, and their successors, should elect a man learned and fit for the aforesaid office of under master of the free school aforesaid, in the manner and form with which the aforesaid master was to be elected, and

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should present him to the master of the free school for the time being, who, being so nominated or elected, and presented, should be admitted as under master of the free school, and be accounted and be under master of the same. And moreover she did will, ordain, and grant, that the aforesaid principal and scholars of King's Hall and College of Brazen Nose, in Oxford aforesaid, and their successors, should be governors of the free school aforesaid for ever; and that the said governors, for the well and faithfully exercising and discharging the same office from the day of the date thereof, and their successors, governors of the aforesaid free school, in deed, fact, and name, moreover should be one body corporate and politic in themselves, for ever, by the name of principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the free school of Queen Elizabeth, in Middleton, incorporate and established; and she did incorporate them the principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the free school of Queen Elizabeth, in Middleton, and their successors; and she did create, erect, ordain, make, constitute, and establish them a body corporate and politic, by the same name, to last actually and fully for ever; and she did will, ordain, and grant for her, her heirs, and successors, that the said principal and scholars of the King's hall and College of Brazen Nose, in Oxford, governors of the free school, and their successors, by the name of Principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the free school of Queen Elizabeth, in Middleton, might have a perpetual succession, and with

the usual powers and privileges to have, hold, receive, and take goods, chattels, manors, lands, messuages, tenements, meadows, feedings, pastures, rectories, tithes, advowsons of churches, rents, reversions, services, and other hereditaments whatsoever, as well from her, her heirs and successors, as from the said Alexander Nowell, his heirs or assigns, or from any other person, spiritual or temporal, or from any other persons whomsoever, to them and their heirs in fee and perpetuity, and for all and singular things done and to be done: And moreover she did will, and, for herself, her heirs and successors, grant to the principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the free school aforesaid, and their successors, that they should have for ever a common seal, to be used as therein mentioned, and that they and their successors, by the name of principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the free school of Queen Elizabeth, in Middleton, might plead and be impleaded, as therein mentioned, in all causes and actions, real, personal, and mixed, in any of her courts, or the courts of her heirs and successors, and in the courts of any other persons, before any justices or judges, ecclesiastical or secular, or any other persons whomsoever, within her kingdom of England; and that the scholars of the free school aforesaid might, from time to time, be ever animated and incited to pursue the study of letters, and to make greater progress in them, of her further grace, certain knowledge, and mere motion, she did will and ordain, that further there should be, of her own

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foundation, in the aforesaid King's Hall or College of Brazen Nose, in Oxford aforesaid, above the ancient and accustomed number of scholarships and scholars established in the same King's Hall and College of Brazen Nose, in Oxford, six scholarships or places for scholars, to continue for ever; and that six proper youths who should have perfectly learnt the rudiments of grammar, either in the free school aforesaid, which she chiefly desired, if so many from time to time therein should be found who should have been in the same school for three years at the least, or otherwise in the schools of Whalley or Burneley, in her said county of Lancaster, if so many in the same or any other of them should be found fit, who had been in any other of them for three years at the least, or otherwise in any other grammar school in her said county of Lancaster, should be joined to the said King's Hall and College aforesaid, from time to time, and unto the same scholarships or places for scholars from time to time, should be appointed and constituted, and should enjoy the same for six years and no more, and should be called Scholars of Queen Elizabeth, in King's Hall or College of Brazen Nose, and should have a *perpetual succession*; and that the nomination of such six scholars, from time to time to be chosen into the said King's Hall and College of Brazen Nose aforesaid, should belong and appertain to the said Alexander Nowell as long as he should live, and after his decease to the said principal and scholars of the King's Hall and College of Brazen Nose aforesaid, and their successors for ever, to be nominated and elected in the manner and form in which the then present scholars, fellows of the same King's Hall

and College, were nominated and chosen : And that from time to time, for ever, in the same manner, the person or persons who by the said Alexander Nowell during his life, to some one or any of the aforesaid scholarships, should have been nominated, and by his writing, sealed with his seal, presented to the principal of the said King's Hall and College aforesaid for the time being; and after the decease of the said Alexander Nowell, by the principal and scholars of the same King's Hall and College, or by the principal and the major part of six of the senior scholars, fellows of the said King's Hall and College for the time being (observing her directions as aforesaid), should have been elected, within two days then next should be admitted into the number of six scholars aforesaid, and so presented, or elected and admitted, and their successors in like manner, to be presented, or elected, or admitted, she did nominate, make, ordain, and constitute scholars of Queen Elizabeth, in King's Hall or College of Brazen Nose, in Oxford, *for ever*; and she *incorporated* them with the same King's Hall and College of Brazen Nose, in Oxford : And she did will that they, by the statutes and ordinances of the said King's Hall and College, which should not be contrary to the ordinances in those her letters patent, expressed (in like manner as any other of the scholars of the same King's Hall and College) in all things should be bound, governed, and ruled; and since the said Alexander Nowell had it in his mind and desire to erect and establish, for the time to come, more scholarships or places for scholars, over and above the said six scholarships, thereby founded and established in the aforesaid King's Hall and

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College of Brazen Nose: And she, desiring to promote his pious intention and proposition, on that point, of her further grace, certain knowledge, and mere motion, gave and granted free power and licence for her, her heirs and successors, to the said Alexander Nowell, his heirs, executors, administrators, and assigns, that he or they, or any one of them might, and might be able to make, found, erect, and establish seven scholarships, or places for scholars (besides the aforesaid six scholarships thereby established, and above the accustomed number of scholarships), in the aforesaid King's Hall and College aforesaid, of old appointed, either altogether or at different times, in the said King's Hall and College *for ever*, and to all future times *to continue*; and that seven fit youths, at the same or at different times, by the said Alexander Nowell, or by his heirs, executors, administrators, and assigns, or any one, or any of them, by writing, or at any future time to be nominated, and to the said principal and scholars of the said King's Hall and College of Brazen Nose, in Oxford, aforesaid, to be presented, should be received into the said King's Hall and College aforesaid, and should be placed and established in the same scholarships or places for scholars, and the same should enjoy for six years and no more, and in like manner should be called scholars of Queen Elizabeth in King's Hall and College of Brazen Nose, in Oxford, and with the said King's Hall and College aforesaid should be incorporated, and have a perpetual succession; and whensoever and so often as the said seven scholarships, or any or either of them, should thenceforth happen to become vacant, she did will and ordain, that from the

fit youths to be nominated, presented, and elected, admitted and governed from time to time, after the manner, according to the form and ordinances above written, concerning the aforesaid six scholarships thereby founded, who in the free school aforesaid (if so many therein be found so fitted from time to time, or should have been in the schools of Whalley or Burneley aforesaid) for three years at least, or either of them, or otherwise, in any other grammar school in her county of Lancaster, should have perfectly learnt grammar, should supply the vacant places of the scholars; and that the aforesaid seven scholars, and each of them, and their successors, who should be received and chosen into the said scholarships by the said Alexander Nowell, or by his heirs, executors, administrators, or assigns, or any one, or any of them, by virtue of those her letters patent, to be founded and established in the aforesaid hall and college from time to time, should have and receive such and so great annual stipends as the aforesaid Alexander Nowell, or his heirs, executors, administrators, or assigns, or any one, or any of them, after that manner in future, founding scholarships in King's Hall and College aforesaid, should choose to assign and limit to them, or any of them. And moreover, of her further grace, certain knowledge, and mere motion, she gave and granted full power and authority to the said Alexander Nowell, clerk, and to the aforesaid principal and scholars of King's Hall and College of Brazen Nose, governors of the free school aforesaid, and their successors, that he during his natural life, and after his decease that they and their successors, should make, and might and should be able to make, fit and

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Wholesome statutes and ordinances, in writing, concerning and touching the ordering, governing, and directing, as well of the master and under master of the free school aforesaid, for the time being, and of the aforesaid six scholars in the aforesaid King's Hall and College of Brazen Nose, by her, as aforesaid, founded, for the time being, as of the aforesaid seven scholars in the said King's Hall and College, by virtue of those her letters patent to be founded aforesaid, by the aforesaid Alexander Nowell, or his heirs, executors, administrators, or assigns, or any one, or any of them, in future for the time being, and concerning and touching the stipends and salaries of the said master and under master of the free school aforesaid; and of the scholars in King's Hall and college aforesaid, as well founded as aforesaid to be founded; and every of them, and also every other thing whatsoever, signified or to be signified, touching and concerning the same free school, and the scholars of the same for the time being, and the order, governance, preservation, and *disposition of the rents and revenues* for the support of the said free school and scholars, so that the said ordinances and statutes should not be contrary to the ordinances in those her letters patent expressed, which said statutes and ordinances, so to be made, she did will, grant, and command, firmly and inviolably to be observed from time to time for ever. And that her aforesaid intention might have a greater effect, of her further grace, certain knowledge, and mere motion, she did give and grant to the then principal and scholars of King's Hall and College of Brazen Nose, in Oxford aforesaid, for ever, by the name of prin-

principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the free school of Queen Elizabeth, in Middleton, all and singular her annual rents and hereditaments therein after specified (that is to say,) all that yearly rent of 65s. 8d. per annum, issuing out of certain tenements of the dean and chapter of her said cathedral church of St. Paul's, in Iremonger Lane, in her city of London, and by them paid for the obit in the same church, for the soul of John Duke of Lancaster, then lately held, and then being in her hands, by the operation and wording of a certain act, amongst others published and provided, concerning divers chantries, colleges, free chapels, and their possessions, granted to her very dear brother Edward the sixth, then lately king of England, in a parliament held at Westminster, in the first year of his reign: and all that annual rent of 65s. 8d. per annum, in like manner issuing from the said tenements in Iremonger Lane aforesaid, and paid by the aforesaid dean and chapter for an obit in the same church for the soul of Blanch, Countess or Duchess of Lancaster, then lately in like manner held, and being in her hands, by operation of the act aforesaid: and which annual rents and other premises were extended in the whole to the clear annual value of 28l. 7s. 2d. *; to have,

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* In the letters patent the passages in italics are as follows: Habend' tenend' et gaudend' omnia et singula prædict' annuales reddit' et hereditamenta per præsentibus superius concessa prædict' principali et scholaribus Aulae Regiae et Collegij de Brazen Nose in Oxon' gubernatoribus liberæ scholæ Regiæ Elisabeth' in Middleton præd' et successoribus suis impm. ad propriu' opus et usum eosundem principalis et scholariu' ejusdem Aulae Regiæ et Collegij de Brazen Nose in Oxon' gubernatorum liberæ scholæ prædictæ et successorum suorum impm. Te-

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hold, and enjoy, all and singular the said annual rents and hereditaments thereby above granted to the said principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the free school of Queen Elizabeth, in Middleton aforesaid, and their successors, for ever, for the particular advantage and use of the said principal and scholars of the said King's Hall and College of Brazen Nose, in Oxford, governors of the free school aforesaid, and their successors, for ever, to hold of her, her heirs and successors, in free, pure, and perpetual alms, and to pay for the same yearly to her, her heirs and successors, 8l. 7s. 2d. of lawful money of England, on the feast of St. Michael the Archangel, every year, into the hands of her receiver-general, or collector of the rents of her farms, lands, and tenements, then late chantries, or other revenues and possessions in her city of London, or in her county of Middlesex, for the time being, to be paid for all services, rents, exactions, or demands whatever, thenceforth to her and her heirs or suc-

nend' de nobis hæredibus et successoribus nris in liberam puram et pptuam eleemosinam.

Ac reddend' inde, &c. &c.

Ed tamen intencoe qd ex præmissis per præsentis præconcessis et ex alijs terris tenementis redditibus et hæreditamentis imposterum ad usum liberæ scholæ præd' et discipulorum prædcorum prædictis principali et scholaribus Aulæ Regiæ et Collegij de Brasen Nose in Oxon' gubernatoribus liberæ scholæ prædcæ vel successoribus suis dand' et concedend' ijdem principalis et scholares Aulæ Regiæ et Collegij de Brasen Nose in Oxon' gubernatores liberæ scholæ prædcæ et successores sui quoddam annuale stipendiu' viginti marcaru', &c. &c. The Respondents contended that the translation of the words *ed tamen intentione* was incorrect, because the word "*tamen*" was put in opposition to the preceding words, "*ad proprium opus et usum.*" But see the superadded words, "*eorundem,*" &c. "*gubernatorum,*" &c.

cessors, in every manner to be rendered, paid, or done: *To this intent, that out of the premises thereby before granted, and of other lands, tenements, rents, and hereditaments in future, to the use of the free school aforesaid, by the scholars aforesaid, as of the aforesaid principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the free school aforesaid, or their successors, to be given and granted the said principal and scholars of King's Hall and Brazen Nose, in Oxford, governors of the free school aforesaid, and their successors, should pay, or cause to be paid, annually for ever, a certain annual stipend of 20 marks, at the least, of lawful money of England, to the aforesaid Edmund Ireland, the then master of the free school aforesaid, and his successors for the time being; a certain annual stipend of 10 marks, at the least, of lawful money of England aforesaid, to the aforesaid under master of the aforesaid free school, for the time being, at the feast of St. Michael the Archangel, and the annunciation of the Blessed Virgin Mary, or within four weeks next following the said feasts, by equal portions; and to each of the six scholars, by her as aforesaid founded, and to be chosen and elected into King's Hall and College aforesaid, from time to time, five marks of lawful money of England annually. And moreover, of her further grace, and her certain knowledge, and mere motion, she gave and granted to the aforesaid principal and scholars of King's Hall and College of Brazen Nose, in Oxford aforesaid, governors of the free school aforesaid, and to their successors, special and free licence, and lawful power and authority, to have, receive, and take to them and their successors, after the date thereof*

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for ever (above the premises thereby granted, and above the lands, tenements, and hereditaments whatsoever received, or to be thereafter received, by the aforesaid principal and scholars of King's Hall and College of Brazen Nose, in Oxford, by virtue of any letters patent, by her progenitors, or any of them, or by their licence to the same principal and scholars therein before granted), as well for the better support and maintenance of the free school aforesaid, and scholars aforesaid, those as well thereby founded as those in future to be founded, as for the support of poor students in the said King's Hall and College of Brazen Nose, in Oxford aforesaid, and for further augmenting the number of scholars or students, as well of her, her heirs and successors, as of the said Alexander Nowell, his heirs and assigns, or of any other persons or person whatsoever, any manors, messuages, lands, tenements, rectories, tithes, advowsons, churches, rents, reversions, services, and other hereditaments whatsoever, with their appurtenances, within the kingdom of England, or elsewhere within her dominions, which were not held immediately of her, her heirs or successors, *in capite* or otherwise, by military service, if only they did not exceed the clear yearly value of 100*l.*, beyond all burdens and reprisals, according to the true yearly value of the same; and to the same Alexander Nowell, his heirs, executors, and assigns, and said other persons whomsoever, and to any person whomsoever, or to any of them, that he, or they, or any one of them, might give, grant, sell, bequeath, or alienate the manors, messuages, lands, tenements, rectories, tenths, advowsons, churches, rents, reversions, services, and other the

hereditaments aforesaid, whatsoever, with their appurtenances, which were not held of her, her heirs or successors, immediately, *in capite* or otherwise, by military service, of the clear yearly value of 100*l.*, beyond all burdens and reprisals, according to the true ancient value of the same, to the said principal and scholars of King's Hall and College of Brazen Nose, in Oxford aforesaid, governors of the free school aforesaid, and to their successors, for the use aforesaid, for ever; by the tenor of those presents likewise she gave special licence to have, hold, and enjoy, and in *mortmain*, to the said principal and scholars of King's Hall and College of Brazen Nose, in Oxford aforesaid, governors of the free school aforesaid, and their successors, to possess for ever as therein mentioned.

The information then stated an indenture dated the 30th of September, 1572, being a deed of compromise with the Dean and Chapter of St. Paul's, granting the rent of 4*l.* 13*s.* 4*d.* *per annum*, and another indenture, dated the 26th of October, 1574, being a second deed of compromise with the Dean and Chapter of St. Paul's, granting the rent of 4*l.* 13*s.* 4*d.*, and made between the said Alexander Nowell, clerk, Dean of the cathedral church of St. Paul's in London, and the chapter of the same church, of the first part; the principal and scholars of the King's Hall and College of Brazen Nose, in Oxford, governors of the free school of Queen Elizabeth, in Middleton, of the second part; and Edmund Ireland, master of the said free school, of the third part; after reciting fully the said letters patent, bearing date the 11th of August in the fourteenth year of the reign of the said queen, and the grant thereby made to the said

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principal and scholars of the King's Hall and College of Brazen Nose, in Oxford, governors of the free school of Queen Elizabeth, in Middleton, and after reciting the said last-mentioned indenture, and that thereupon as well for the true answering and payment of the said yearly sums, according to the queen's said grant, and for the assurance of the yearly rent of 4*l.* 13*s.* 4*d.*, mentioned in the said indenture, as also for the assurance to the said Edmund Ireland and his successors, of the said annual stipend of 20 marks, and to the usher for the time being of the said free school of the said yearly stipend of 6*l.* 13*s.* 4*d.*, and towards the said yearly stipends limited by the said letters patent to be paid to the said six of the queen's scholars in the said college, it was covenanted, granted, concluded, condescended, and fully agreed, by and between all parties to the said indenture, for themselves and their several successors, in form following;— (that is to say,) the said dean and chapter, for them and their successors, did covenant, promise, and grant, to and with the said principal and scholars, governors as aforesaid, and their successors and to and with the said master of the said free school, and his successors, that they the said dean and chapter, and their successors, in consideration that neither the said principal and governors as aforesaid, nor their successors, should pretend or challenge any estate, right, or interest, to the ground, soil, edifices, and buildings, of any of the premises out of which the same yearly rents were issuing, would from thenceforth yearly pay to the said principal and scholars, governors aforesaid, and their successors, for ever, all the said yearly rents to them granted by the queen, as aforesaid, by the

said letters patent, amounting in the whole to 28*l.* 7*s.* 2*d.*, by the year, at the feasts of the Annunciation of St. Mary the Virgin, and St. Michael the Archangel, or within sixteen days next after the same feasts, by even portions, at the place therein mentioned; and the said dean and chapter, in consideration thereof, and in satisfaction of the said indenture of three parts in that behalf, and being thereto licensed by the queen, by the said letters patent as aforesaid, for them and their successors, did give, grant, and confirm, to the said principal and scholars, governors as aforesaid, and to their successors, one annual or yearly rent of 4*l.* 13*s.* 4*d.*, to be yearly chargeable, issuing and going out of all that their said manor of Boyton, alias Boyton Hall, with the appurtenances, and out of all and singular lands, tenements, rents, reversions, services, and hereditaments to the said manor belonging or appertaining, to have, hold, and enjoy the said annual or yearly rent of 4*l.* 13*s.* 4*d.*, to the said principal and scholars, governors aforesaid, and their successors, governors of the said free school for the time being, for ever, to be paid at the place therein mentioned, at the feasts of the Annunciation of St. Mary the Virgin, and St. Michael the Archangel, or within sixteen days after, by even portions.

The information further stated an indenture, bearing date the 24th day of December, 1574, being a grant from Lord Cheyney to Alexander Nowell and James Wolton, of the manor of Upbery, and other hereditaments, a demise, 15th of February, 1578, from Alexander Nowell and James Wolton to Lord Cheyney, of the manor of Upbery, for sixty years, if Lord Cheyney should so long

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live, and a demise, 31st of May, 1578, by Alexander Nowell and James Wolton, to William Dean and T. Bowyer, of the reversion of the Upbery estate for 99 years, at the rent of 66*l.* 13*s.* 4*d.*: a covenant from Dean and Bowyer to lay out any money received on the sale of the lease, in building the school of Middleton: a covenant by Nowell and Wolton to demand no rent for the two first years of the term granted, if the school were not built, and no money received by the leasees for sale of the lease: a covenant by Dean and Bowyer to lay out the two first years' rent in building the school: and a grant 10th of April, 1579, from Alexander Nowell and James Wolton of the Upbery estate to Queen Elizabeth.

The information then further stated, that by letters patent, under the great seal of England, bearing date on or about the 25th of June, 1579, and in the twenty-first year of the said Queen's reign, it was witnessed, that her Majesty, of her special grace, certain knowledge, and mere motion, and also at the humble petition of the said Alexander Nowell, for herself, her heirs and successors, gave and granted, to the said principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of her said free school in Middleton, all that the said lordship and manor of Upbery, and other the hereditaments and premises mentioned and comprised in the said last-mentioned deed poll, all and singular which premises her said Majesty then lately had, to her or her heirs, and successors, of the gift and grant of the said Alexander Nowell and James Wolton, as by the writing of the said Alexander and James to her made, and in her chancery enrolled of record more fully was manifest

and appeared, as fully and freely, and wholly, as the last prioress of the late priory of St. Sexburg, in the island of Shepey, in the said county of Kent, or any of her predecessors, or Sir Thomas Cheyne, knight, treasurer of the hospital of the Lord Henry the Eighth, formerly King of England, her father, or Sir Henry Cheyne, late Lord Cheyne, son and heir of the said Thomas, or the said Alexander Nowell and James Wolton, his cousin, or any other person or persons theretofore having, holding, or being seised of the same, or any parcel of the same, ever had, or ought to have held or enjoyed the same, or any parcel of them, as fully, freely, and wholly, as all and singular the said premises came to the hands of the said late King Henry the Eighth, her father, or to her hands, by the operation and form of the dissolution of the said late priory of St. Sexburgh, or by the operation, or form, of any charter, gift, grant, or confirmation, to her said father, or to her, of the premises, or any part thereof, in any manner made; and moreover, of her further grace, her said Majesty gave and thereby granted to the aforesaid principal and scholars, and their successors, within the lordships, manors, messuages, lands, tenements, and all and singular other the premises, and within every parcel of them, so many, so great, the like, the same, such, and similar courts leet, views of frank pledge, and all things that to view of frank pledge belong, and the assize and assay of bread and wine, and also all chattels waived, estrays, chattels, and felons, and fugitives, free warrens, wrecks of the sea, and all other rights, jurisdictions, franchises, liberties, privileges, profits, commodities, emoluments, and hereditaments what-

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soever, as, and as fully, freely, and wholly, as the last prioress of the said late priory of St. Sexburgh; or any one or any of her predecessors, or any of them, at any time before the several dissolutions of the said late monasteries and priories, or any one or any of them theretofore holding, possessing, or being seized of the said premises, or any parcel of the same, had, or could have had, held or enjoyed in the said lordships, manors, messuages, lands, and other the premises, or in any parcel thereof, by the operation or form of any charter, gift, grant, or confirmation, or of any letters patent by her, or any of her progenitors, Kings of England, in any manner made, granted, or confirmed, or by the operation of any prescription, usage, or custom theretofore had or used, or in any other way whatsoever; to hold in perpetual *mortmain*, to possess the said manors, rectory, chapel, advowsons, and all and singular other the premises above expressed, or specified, with their appurtenances, to the said principal and scholars of King's Hall and College aforesaid, governors of her said free schools in Middleton, and their successors; to hold of her said Majesty, her heirs and successors, in free, pure, and perpetual alms, for ever. And her said Majesty willed also, that the aforesaid principal, and every one of the fellows of the College aforesaid, when they should receive the said letters patent of her Majesty's said gift, should each separately take an oath, in their public assembly, that they would *pay over* * the rents and sums of money which from the said manor of Upbery and rectory of Gillingham

* The word in the original is "impending," which the Respondents contended should be translated "bestow or employ," and not as in the text. See the note, p. 400.

should come into their hands, unto and for the purposes thereafter set forth, for ever, in all times then to come; that is to say, that they would pay every year, to each of her said Majesty's thirteen poor scholars elected out of her free school, in Middleton aforesaid, or other schools in her said county of Lancaster, according to her foundation of the said school, *for their support** 3*l.* 6*s.* 8*d.* of lawful money of Great Britain; and to the master of her said free school, in Middleton, 23*s.* 4*d.* *per annum*; and to the under master of the said school, 3*l.* 6*s.* 8*d.* *per annum*, as an augmentation; or increase of their stipends, by equal portions, every period of three months, or usual quarters of the year. Also, as she understood that the stipends of the principal and fellows of the said College were very small, her said Majesty willed, that out of the said rents, and sums of money, they should pay 6*s.* 8*d.* every week, for the improvement of the commons of the said principal and fellows, who should be present in the said College during those weeks, or should be absent on college business, of which sum, every week 16*d.* should be given to the principal, if present; 10*d.* to the vice-principal, if present; and the other 4*s.* 6*d.* to the fellows who should be present, for the increase of their commons; but if the principal, vice-principal, fellows, or fellow, should be absent, and that absence be not on the business of the College, then her Majesty willed, that they should give them no part of the said 6*s.* 8*d.* for the time of such absence; but, when the principal should be absent, and not on the business of the College, then her Majesty willed,

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* The phrase in the original is "ad ipsorum victum," which the Respondents translate "towards their living."

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that they should give no part of the said 6s. 8d. for the time of such absence but, when the principal and scholars be absent, and not on the business of the college, the vice-principal, then present, should receive 16d.; and when the vice-principal should be absent, and not on the business of the College, the senior of the fellows who should fill his place should receive 10d. above and beyond his share of the said 4s. 6d.: moreover, her Majesty willed, that every principal and fellow, at the time of his election, or admission, or afterwards, severally should take an oath, at the public assembly of the fellows of the College aforesaid, that they would *expend** the said rents, and sums of money, for the purposes aforesaid; and also should take an oath, that, as often as any fellowship or fellowships should happen to be vacant, they should choose and admit him, or them, from among her said scholars aforesaid, who should either be superior, or equal, to the other competitors, in erudition, probity of conduct, or piety, into such fellowship, or fellowships.

The information further stated a certain indenture, dated the 15th of April, 1586, and in the twenty-eighth year of the reign of the said queen, and made between Richard Asheton, of Middleton, in the county of Lancaster, on the one part; and the said Alexander Nowell, dean, as aforesaid, on the other part; by which it was witnessed that the said Richard Asheton, in consideration and endowment of the free school of Queen Elizabeth, and at the humble request and suit of the said Alexander Nowell, erected and made, within the

* The original has "impudent," which the Respondents translate "apply, bestow, or employ." The word "expend" they objected to, as inaccurately implying a total consumption.

lordship or manor of the said Richard, in Middleton aforesaid, and in consideration of the grant by the said Alexander Nowell, for the use of the said school, and scholars there employed, did fully clearly, and absolutely, give, grant, bargain, and sell unto the said Alexander Nowell, one close or pightle of meadow, to have and to hold, with free ingress and egress to and from the premises, to the said Alexander Nowell and his assigns, and also to the school master, the usher, and scholars of the said school, for the time being, and their successors, with their horses, carts, and carriage of all things necessary; and that by an indenture of feoffment, dated the 20th of November, 1598, Alexander Nowell gave to the said principal and scholars, governors as aforesaid, all the aforesaid premises, together with all houses and buildings by the said Alexander Nowell erected and built upon the lower part of the said field, for the school of Middleton aforesaid, and the dwellings of the master and under master of the said school, and their successors, for ever, for and in the name of Queen Elizabeth's Free School, in Middleton, to hold to the said principal and scholars, governors as aforesaid, and their successors, to the use of the said principal scholars, and their successors, for ever.

The information further stated, that under and by virtue of the several letters patent, and of the grants the principal, by the name and description of the principal and scholars of King's Hall and College of Brazen Nose, in Oxford, governors of the free school of Queen Elizabeth, in Middleton aforesaid, entered upon and took possession of the several manors and lordships, rents, advowsons, and other the premises thereby respectively granted,

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and entered into receipt of the rents and profits thereof, and that they have ever since continued, and now are in such possession and receipt respectively, except as therein mentioned: and that the annual rents, or sums, so received by the said principal and scholars, governors as aforesaid, under the said indenture of the 26th of October, 1574, amounting, together with the new or conventional rent of 4*l.* 13*s.* 4*d.*, thereby covenanted to be paid as aforesaid, to the sum of 33*l.* 0*s.* 6*d.* *per annum*, or thereabouts, were, for and during the space of several years after the said principal and scholars, so as aforesaid, entered into receipt thereof, applied by them (after payment thereof of the said crown rent of 8*l.* 7*s.* 2*d.*) in payment of the several stipends so as aforesaid directed to be paid by the said first-mentioned letters patent, and otherwise, according to the true intent and purport thereof; but that from and after the year 1590, when it is alleged that the said principal and scholars, governors as aforesaid, entered into possession of the rents and profits of the said manor of Upberry, and other premises contained in the said second-mentioned letters patent, of the 25th of June, 1579, the said principal and scholars, governors as aforesaid, ceased to apply the said rent of 4*l.* 13*s.* 4*d.*, in and towards the purposes to which the same was previously so applied as aforesaid, and have ever since continued, and still continue, to apply the same to their own use and benefit; and they allege as a reason for so applying the same that the said second-mentioned letters patent having provided for payment out of the rents and profits of the said manor and premises, of the whole amount of the stipends thereby prescribed, it was thereupon understood by the said principal and scholars to be,

and was in fact the intention of the said Alexander Nowell that the same should remain unappropriated, and fall into the general revenues of the said College; but the information charged, that there was no evidence of such intention to be collected, either from the terms of the letters patent or otherwise, in any manner whatsoever, and that, on the contrary, the principal and scholars, governors as aforesaid, were and ought to be held properly accountable for, and in respect of the whole rent so covenanted to be paid to the objects of the said charitable foundation.

The information further stated, that for and during the space of several years after the said principal and scholars, governors as aforesaid, entered into receipt of the said annual rent of 66*l.* 13*s.* 4*d.*, so as aforesaid, reserved and made payable out of the said last-mentioned manor and premises, they applied the whole of such rent in payment of the annual stipends, and otherwise, as directed by the said secondly-mentioned letters patent, except as to certain portions of such stipends, which during the occasional non-residence of the persons to or among whom the same were by the said letters patent made payable ceased to be, and were no longer payable, and were therefore considered by the said principal and scholars as applicable, and were accordingly applied by them to and for their own benefit; but which the said information insisted was an improper application thereof, in respect of which, they, the principal and scholars, governors as aforesaid, are in like manner properly accountable to the objects of the said charity.

The information further stated, that at Michaelmas, 1686, the principal and scholars entered into

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possession of the manor of Upbery, and granted leases for short terms, reserving the old rent, and took fines upon renewals, and applied the fines and surplus rents to their own use; that for several years after the date of the letters patent the surplus rents were applied in payment of the stipends in support of the thirteen scholarships; but that in the year 1700, the scholarships were reduced and consolidated. Notwithstanding which, there had been a deficiency of candidates for the scholarships; and that the stipends unappropriated were applied by the principal and scholars to their own use, or to the general benefit of the College.

The information then set forth the particulars of which the trust estates consisted: a deed of appointment, 27th of March, 1593, whereby Alexander Nowell assigned 20*l.* to the head master, and a life estate in certain premises; that sales had been made of parts of the manor of Upbery to the Board of Ordnance, and the purchase monies received by the principal and scholars; that 700*l.* 10*s.* part of the purchase money had been laid out in the purchase of an estate at Holbeach, and 315*l.* laid out in the purchase of stock, and 48*l.* 15*s.* received by the principal and scholars, and applied to their own use.

The information further stated, that the residue of the demesne lands had been demised, and that upon the granting of the leases the two several sums of 3794*l.* 10*s.* 7½*d.*, and 1700*l.*, were paid to and received by the principal and scholars, by way of fine for such respective grant, and renewal thereof, and had since been applied by them in and towards their general corporate purposes as aforesaid, or in some other manner wholly inconsistent with the objects of the said charity, although

it was charged by the information that they were and ought to be held strictly accountable for the same, in manner aforesaid. That the original school house, of and belonging to the said free grammar school at Middleton, was erected and finished by, and at the sole costs and charges of, Alexander Nowell, in his lifetime, whereto certain other erections and buildings were afterwards added, and that the same then consisted of a certain erection, or messuage, and premises, in a very ruinous and dilapidated condition, and very inadequate to, or unfit for, the purposes to which the same were by the said Alexander Nowell intended, and to which the same ought to be devoted, regard being had to the altered circumstances of the times, and to the present habits and wants of society.

The information further stated, that the same then consisted of, and was divided into, an upper and a lower school; whereof the upper school contained about forty or fifty boys, who were for the most part taught only reading, writing, and arithmetic, a very few, if any, of the said boys being instructed in classical learning, according to what appears by the said letters patent to have been the primary intention of the said establishment, but which has for a great many years past been wholly, or almost wholly, neglected and abandoned; and the said lower school contains at present about sixty or seventy boys and girls, who are taught only reading and writing: and that for their education in the said upper school, the said several boys, who were so as aforesaid instructed therein, paid to the said head master the sum of 1*l.* 1*s.* each per quarter; and that for their education in the said lower school, the said several boys and girls, who are so as aforesaid taught therein, pay to the said under

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master, in some cases the sum of 4*d.*, and in other cases the sum of 2*d.* each by the week : all which payments, so made by them as aforesaid, together with the subjects and mode of instruction, were contrary to, or wholly inconsistent with, the charitable intents and purposes so expressed as aforesaid : that the only payments which were then, or for a great many years past had been, made by the said principal and scholars, with and out of the said trust funds and premises so come to their hands as aforesaid, consisted of the several and respective original and increased stipends or salaries so as aforesaid directed to be paid to the head master and under master of the said school at Middleton, together with certain small occasional payments in respect of the 6*s.* 8*d.* per week, so directed as aforesaid to be paid for the improvement of the commons of the principal and fellows of the said College of Brazen Nose, and of the said scholarships ; but which last-mentioned payments, in respect of scholarships (although the principal object of the said foundation), had for a great many years past wholly ceased, and been discontinued : that the only addition to the incomes of the said head master and under master respectively, in respect of their said offices, over and above the small payments which are so as aforesaid made to them respectively, by their said several and respective scholars, consisted of a certain annual sum of 5*l.* 10*s.* 8*d.*, which the said head master is entitled to receive, and receives accordingly, out of the Duchy of Lancaster, under and by virtue of certain letters patent under the duchy seal of Lancaster aforesaid, bearing date the 14th of November in the seventeenth year of the reign of her said late Majesty Queen Elizabeth.

The information further stated, that for a great number of years past no scholars had been elected from the said school at Middleton to Brazen Nose College, although it was the original and primary intention of her said late Majesty, and of the said Alexander Nowell, the founder of the said charity, as expressed in and by the said several letters patent, and also as appeared from and by several original letters of the said Alexander Nowell, and other original documents, still preserved and deposited in the British Museum and elsewhere, and to which his Majesty's Attorney-General craved leave to refer accordingly, that the said school should become, and be an institution for classical learning, on the most liberal and extensive scale which the said trust funds and premises would extend to and admit: And although in order thereto, and for the better promotion and encouragement of such primary object, provision was thereby made for the election of scholars to the said College, with suitable stipends, but which had, so as aforesaid, been wholly neglected, and suffered to fall into disuse and abandonment, notwithstanding that the said charity funds and premises (if the same were, in each and every year, duly and properly applied to the purposes for which the said estates were so granted as aforesaid) would be and were amply sufficient to meet the intention of her said late Majesty, and of the said Alexander Nowell, the founder of the said charity, in the most extensive and beneficial manner, and so as to be productive of great good, and for the advantage not only of the very numerous inhabitants of the town of Middleton, and of its neighbourhood, but of the kingdom at large, in respect of the great public good

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which is derived from the diffusion of learning, and the extension of sound and liberal education.

It was charged by the information, that the Respondents were not entitled as they claimed to be, to the entire beneficial interest in the said trust estates, subject only to the payment of the annual sums specified in the several letters patent, but were trustees of the whole of the surplus income of the charity, for the benefit of the free grammar school at Middleton, and such other objects of the founder's bounty as were still capable of being carried into effect : that the Respondents had, for upwards of a century past, ceased to apply any part of the income of the charity estates to the charitable purposes directed by the letters patent, except so much as was sufficient for payment of the stipends to the head master and under master of the school at Middleton ; and that with regard to the other objects of the charity, and especially as to the scholars directed to be chosen to the said scholarships, and sent to the said College of Brazen Nose, they had either suffered them to fail altogether, or had refused the benefit thereof to such persons as were from time to time properly qualified, and ought to have been appointed thereto.

And the information further charged, that ever since the falling in of the original lease of the manor and other premises comprised in the secondly-mentioned letters patent, the surplus rents and profits of the trust estates, including the fines received on the renewal of leases, had been directed to objects inconsistent with the purposes of the charity ; and had, in fact, been applied in and towards the general corporate purposes, or otherwise, for the sole use and benefit of the College of

Brazen Nose, which the information charged was not within the contemplation of the founder of the charity. And that the said charity having for so great a number of years been suffered to fall into neglect and abuse, and the said charity estates being of very considerable annual value, it had become necessary that the Court of Chancery should interfere, to correct such abuses, and that directions should be given for applying the rents and profits of the charity estates to the purposes intended by the founder, such as they were expressed in the said letters patent, or otherwise, as near thereto as was consistent with the increased value of the trust estates, and with the alteration of times and circumstances since the foundation of the charity.

The information prayed that the rights of the charity, in respect of the several matters mentioned in the information, might be ascertained and declared by the decree of the Court, and that all proper directions might be given for the establishment and maintenance of the charity, and for the increase and augmentation of the said establishment, by and out of the charity estates; and that an account might be taken of the estates belonging to the charity, or which were then subject to the trusts thereof, and of what was due in respect thereof from the Respondents, in their capacity of governors of the free school of Queen Elizabeth, at Middleton; and that what should be found due from them might be answered and paid by them; and that it might be referred to one of the Masters of the Court to approve of a scheme for the application thereof, and for the better regulation of the charity in future, and the administration of the

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charity estates, and the application of the funds and income of the charity to the purposes so to be declared respecting the same: and that in the meantime a receiver might be appointed of the charity estates, with the usual directions.

The principal and scholars, by their answer to the original information, admitted the letters patent of the 11th August, 1572, the indenture of the 23d December, 1574, the lease 15th February, 1578, by Dean Nowell and James Wolton to Lord Cheyne; the lease 31st May, 1578, to William Deane and Thomas Bowyer; and contended that the provisions shewed that the lease was regarded by Nowell as a beneficial one, and that the rent thereby reserved was not the annual value of the estate, but that it was expected the lease would, if sold, produce at least money enough for the charges of building the school house. They admitted the grant of the 10th April, 1579; and the letters patent of the 25th June, 1579; but insisted that some parts of the letters patent were not correctly translated in the information. They admitted the indenture of the 1st February, 1587; the assignment of the lease to Deane and Bowyer, to Elizabeth Nowell and Edward Blunt: that Lord Cheyne died in September, 1587; and that the College entered into receipt of the rent of 66*l.* 13*s.* 4*d.* from Michaelmas, 1589: that the money rents amounting to 20*l.* had been and were applied in payment of the stipends of 13*l.* 6*s.* 8*d.*, and 6*l.* 18*s.* 4*d.* to the master and under master: that the rent of 66*l.* 13*s.* 4*d.* had from the year 1589 been generally applied to the payments directed by the letters patent; but that the College had exercised a discretion to deduct part of the stipends

to the scholars, and, with the consent of Dean Nowell, the portions deducted had been allowed to fall into the general revenues of the College: that other objects than scholars from Middleton School, or any of the schools named in the letters patent, were, during Dean Nowell's life, admitted by him to have the benefit of the scholars' stipends: that the charity, so far as related to the scholarships, failed of effect from the commencement, and other scholars were substituted by Dean Nowell, there being a deficiency of candidates from the favoured schools: that the thirteen scholarships could not by any remedial measure be kept full, there being a continued deficiency of proper objects, and therefore the principal and scholars of the College, in or about the year 1700, consolidated twelve of such stipends, and formed with them two annual stipends of 20*l.* each, leaving the thirteenth scholarship as evidence of the original value; and that the surplus of such annual stipends, after making such payments, was applied to the general purposes of the College: that the rents and profits of the trust estate and premises had always been so applied, and never applied to the private emolument of the principal and scholars: that the principal and scholars received and applied the rent of 4*l.* 13*s.* 4*d.* until they came into possession of the Manor of Upbery, when Dean Nowell, considering that rent unappropriated, allowed the same to fall into the general revenues of the College; but that afterwards an application to the College was made by Dean Nowell, that they would grant the 4*l.* 13*s.* 4*d.* during certain successive years to his relative, Lawrence Nowell. The answer then set forth a statement of the property into the pos-

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session of which the principal and scholars entered, and admitted that part of the demesne lands of Upbery were sold in 1785, 1806, and 1814, to the Board of Ordnance; but they contended that the produce of such sales had not been misapplied; that 7008*l.* 10*s.* 0*d.*, the purchase-money, had been invested in the purchase of lands in Holbeach. They stated that the demesne lands were uniformly let in one lease, reserving the original rent of 66*l.* 13*s.* 4*d.* until the year 1823, when the rent was increased to 105*l.*: that the fine on renewal had varied in amount, and that the surplus of rents, fines, and purchase-money, after answering stipends and yearly payments, had been applied to the general benefit and maintenance of the College. They stated that the school-house was built by Dean Nowell, but never repaired out of the rents of the lands held by them under the letters patent: that the master in 1593 was appointed by Dean Nowell: they denied that the school-house was in a dilapidated condition, inasmuch as it had been repaired at the cost of the parish of Middleton, by virtue of some agreement, according to tradition, between Dean Nowell and the parish. The answer then set forth a deed of feoffment, of 20th November, 40th Queen Elizabeth, by which Dean Nowell gave to the College, *as Governors* of Queen Elizabeth's Free School, at Middleton, a close of land, &c. and the buildings erected by Dean Nowell for the school and dwellings of the masters and their successors, &c. to hold to the College *governors as aforesaid*, and their successors, to the use of the College, and their successors. The answer then stated that the Defendants had allowed the master of the school to hold and enjoy the

lands comprised in the deed of feoffment of the members of the College deputed as visitors to the school. The answer then stated, that as the Defendants had heard and believed the school consisted of and was divided into an upper and a lower school ; and they further stated, that some members of their College had been from time to time deputed for the purpose of visiting and reporting to them the state of the said school, and that by a report made to them in January, 1826, of the state thereof, it appeared that there had been during the half year ending in December, 1825, thirty-six boys in the upper, and eighty-four scholars in the lower school : and the Defendants believed that such boys, but not such boys and girls, there being no girls in the said upper school, were for the most part taught reading, writing, and arithmetic ; and some boys, but how many the Defendants were unable to set forth as to their belief or otherwise, were instructed in classical learning according to the primary intention of the founder expressed as aforesaid, and were then, or lately were, in a course of preparation for College. Therefore, and under the circumstances aforesaid, the Defendants submitted whether such intention so expressed as aforesaid had been for a great or any number of years past wholly, or almost wholly, neglected and abandoned. And they further stated, that such lower school as aforesaid did then contain about sixty or seventy boys and girls, and that such boys and girls were taught reading and writing, the elements of religious knowledge, and the catechism of the Church of England ; and the Defendants stated their belief that for their instruction in writing and arithmetic in the upper

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school, the said several boys who were instructed therein paid to the head master the sum of 1*l.* 1*s.* each per quarter; and for their education in the lower school, the several boys and girls who were taught therein paid to the under master in some cases the sum of 4*d.*, and in others the sum of 2*d.* each by the week; but the Defendants denied the allegations contained in the original information, that the only payments which then were, or for a great many or any number of years past had been, made by the Defendants, with and out of the charity funds and premises come to their hands, consisted of a yearly stipend or salary of 14*l.* to the master, and of 10*l.* to the under master; and on the contrary they stated, that from the earliest time when the Defendants became possessed of the several rents and money payments under and by virtue of the letters patent of 1572, and thenceforth until the present time, the Defendants had duly and regularly paid the several sums thereby assigned and directed to be paid to the master and under master respectively, except only on some few occasions when the principal and scholars, from the political state of the kingdom and other circumstances, particularly during the protectorate of Oliver Cromwell, were unable duly to collect and obtain payment of the money rents, and were therefore disabled from duly making the said payments. And further, that since the period of the principal and scholars beginning to receive the rent of 66*l.* 13*s.* 4*d.* in the year 1590, and thenceforth until the present time, the principal and scholars had regularly paid the increased stipend of 1*l.* 3*s.* 8*d.* and 3*l.* 6*s.* 8*d.*, thereby assigned to the head master and under master respectively.

And also the sum of 6s. 8d. per week for the improvement of the commons of the principal and fellows of Brazen Nose College; and also the several annual stipends of 3l. 6s. 8d. each thereby directed to be paid to her Majesty's thirteen poor scholars as aforesaid, with such exceptions only as were therein mentioned. The said answer further stated, that in addition to the sum of 14l. as in the said information alleged, the head master was entitled to the further sum of 5l. 10s. 8d. per annum out of the Duchy of Lancaster, under certain letters patent of the 14th of November, in the seventeenth year of her late Majesty Queen Elizabeth, and in respect of which the Defendants believed that the head master received and was paid the sum of 5l. 0s. 8d. per annum, after deducting office fees on the said charge; but they denied that he was so entitled or received such sum in respect of the premises conveyed to them as aforesaid. The answer further stated, that no scholars had been elected from the school at Middleton to Brazen Nose College for twenty years last past; but by reason that the registries of the college, though they regularly notice the elections and dates of the elections of scholars, do not, except occasionally, indicate from what school they come, the Defendants did not know and could not set forth whether, during the space of the last century, any scholars had been elected from the school at Middleton to Brazen Nose College, but they believed that in all such elections a preference had been given to such candidates, if any, as presented themselves from schools within the scope and directions of the said grant. And the Defendants stated, they did not believe that it was

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the original and primary intention of her late Majesty, and of the said Alexander Nowell, the founder of the said charity, as expressed in and by the said several letters patent, that the said school so as aforesaid thereby established should become and be an institution of classical learning, on the most liberal and extensive scale which the funds and premises would extend to and admit; but they admitted, that for the sufficient support of the school, as was then believed, and not in order to such intention, and for the better promotion and encouragement of such object as in the said information was alleged to be the primary object, provision was thereby made for the election of scholars to the said college with suitable stipends; and the Defendants, for the reasons in their said answer appearing, believed and submitted to the Court that Alexander Nowell, the founder of the said charity, did not intend that the same should be further augmented, and as further evidence thereof, they stated that the said Alexander Nowell, by such demise of the hereditaments comprised in the letters patent of 1579 as aforesaid, rendered it impossible that such stipends could be increased for more than a century after the time of the endowment. And the Defendants believed that he expected, for the reasons in their answer mentioned, that the same rent would not be afterwards raised, and therefore the Defendants insisted that Alexander Nowell intended that the said stipends should always be limited as aforesaid, and that he left and intended the then surplus of the rents of the said estates, and all other benefit which at a remote future time might arise from the same, to be applied and used for the better

establishment of Brazen Nose College, as a nobler institution of classical learning.

The answer further stated, that Alexander Nowell was educated in the college of Brazen Nose, and was during sometime a fellow in the college, and afterwards, in the year 1595, became principal thereof, and did at the time of the endowment, by letters to the then Lord Burghley, and other documents which the Defendants believed were written by Alexander Nowell, and are preserved as such in the Lansdown Manuscripts, deposited in the British Museum, assign the fact of his being brought up in the said college in his youth as a reason for his bounty to the same. And the answer further stated, that Alexander Nowell well knew that it was the usual established practice of the college not to increase their rents as their estates increased in value, but to reap the benefit of such increased value by taking fines upon renewing the leases of their estates, and therefore, and with a view to such practice, the Defendants believed that Alexander Nowell limited the stipends to be paid out of the rents and profits of the estates comprised in the grant of 1579, to such a sum as was covered by the annual rent of 66*l.* 13*s.* 4*d.*, in the expectation that the rent would not be increased nor the stipends altered, and that he meant and intended that the contingent advantage which might accrue from a fine upon the renewals of the lease of the said estates, in case the same should progressively increase in value, would and should be retained by the principal and scholars of the said college, and applied to the general use and benefit thereof, and therefore that he gave no

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direction for the application of any future surplus; and that accordingly the surplus of such rents and profits had from the very earliest time, when the principal and scholars of Brazen Nose became possessed of and entitled to the same, been applied and administered for the general benefit of the college and its advancement as an institution of classical learning, without control or opposition by Alexander Nowell during his life-time, and without being at any time challenged or called in question. And the Defendants insisted upon such uniform enjoyment and administration as evidence of the intention of the grant, and of the founder of the charity, and submitted that such use and administration was an application thereof to a charitable purpose, and consistent with the general purposes of the grant, and ought not to be disturbed. And the Defendants, by their answer, further stated, that the oath in the said letters patent of 1579, required to be taken by the principal and fellows of the college, had never been taken, and that the same, so far as regarded a preference to be given to the Queen's scholars in the election of fellows of the said college, was inconsistent and irreconcilable with the original statutes of the college, and the oath required by the founders thereof, and that accordingly another form of oath was, as appeared by the said registry, substituted by Alexander Nowell, to be taken by the then principal and scholars, and therefore the Defendants believed and insisted on such circumstances as evidence, that it was the intention of Alexander Nowell that the old foundation of the college should be blended and incorporated with his new endowment, forming one corporate body

under the name and style of the Principal and Scholars of the King's Hall and College of Brazen Nose, Governors of Queen Elizabeth's Free School at Middleton, and that Alexander Nowell intended such style and description to be the common corporate style of the Defendants, and that accordingly he did during his life-time use such style and description upon other occasions indiscriminately, as well when the matter related to the said school, as when it concerned only the proper and peculiar benefit of the college, and in particular, that being instrumental during his life-time in procuring certain benefactions to be made to the said college for its sole and absolute benefit, he still caused the same to be made to them under such corporate name and style of Governors of the said school; and the Defendants denied that such provision as was in fact intended to be made and was made for the election of scholars to the said college, had been wholly neglected and suffered to fall into disuse and abandonment; but if the same had in any respect fallen into disuse, the Defendants denied that it had been occasioned by any neglect or default of the Defendants, but they admitted that the charity funds (if the same were as the answer submitted they had been, and were in each and every year duly and properly applied for the purposes for which the said estates were so granted as aforesaid) would be and were amply sufficient to meet the intention of her late Majesty Queen Elizabeth, and of Alexander Nowell, the founder of the charity, in the most extensive and beneficial manner; and that such intention, if properly carried into effect (which the said Defendants submitted it had been), as far as regarded the said college of

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Brazen Nose, would be and has been productive of great public good, and, as Defendants believed, would be and has been for the advantage, not only of the very numerous inhabitants of the town of Middleton and of its neighbourhood, but also of the kingdom at large, in respect of the great public good which was derived from the diffusion of learning and the extension of sound and liberal education.

The answer then stated, that the charity estates were considerable, but not of the value of 3,000*l.* per annum: that Nowell treated the chapel of Lyginge as the property of the college: that the Defendants were not intended to be trustees of the estate for the benefit of the school beyond the amount of the several stipends: that the income of the estates had been applied in one uniform manner, in conformity with the general intent of the grant, and in furtherance of the objects thereof: that the trust property had never been misapplied: that it is the universal practice of colleges to apply for their general corporate purposes the surplus arising from grants to them, after payment of the particular charges thereon, and that any interference with this rule, established for centuries, would cause great confusion and distress in all the older colleges of both universities, and that such application ought not to be disturbed.

The answer to the amended information stated, that in consequence of a suit between the principal and scholars, and other persons, respecting the manor of Upbery, &c. the college did for some time, immediately consequent upon the death of Lord Cheyne, receive the rent of 66*l.* 13*s.* 4*d.*: that the arrears of rent were remitted by the

college to the tenants at the request of Alexander Nowell, and that scholars were admitted upon condition that they should not be entitled to any salaries until the rents should be received by the college: that Nowell in his life-time always treated the college as the chief object of his bounty, and that while he was alive the college, with his consent, took the surplus rents, and applied them to the general purposes of the college: that Nowell intended that the surplus of the funds should be so applied, and knew and approved of this application to the general use of the college. The Defendants denied that they ever applied the whole rents in payment of the stipends: and said that Nowell introduced the custom, which had since always been followed, of electing students from other places than those mentioned in the letters patent; that the principal and scholars had granted leases from time to time of the manor and premises, which had been renewed on the payment of certain fines, though not made expressly renewable: that the thirteen scholarships continued to be filled for some time with persons either elected from the school, or substituted, according to the intent of Nowell: that for a considerable time previous to the year 1712, there had been a great deficiency of candidates, and about that year the principal and scholars consolidated the stipends of twelve of the scholarships, which they might have retained on the ground of their being vacant: that they reserved the thirteenth as evidence of the original stipend: that 109 persons had been in the enjoyment of the charity between the years 1700 and 1799.

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The letters patent and the other documents in the cause were produced under admissions signed by the respective solicitors of the parties, comprising certain letters* from Dean Nowell to Lord Burghley, preserved in the British Museum.

* *Letter of Dean Nowell to Lord Burghley, dated 24 July, 1572.*

"IN the Patent of the foundation of her Maties Schole of Middleton & of her xiiij poore Scholares in the College of Brazen Nose in Oxford the same of the Mortmain is not named: for the which by the Advise of Sr Walter Mildmay a blanke was left upon goode hope that it would please her Ma^{tie} to licence a large Sum to be purchased to soo goodlie uses, and in her Maties name and it seemeth of the remembrance hereof noted in a paper for y^r hono^r was not at hande, when y^r h— brought the patent to her Ma^{tie} to be signed wherefore I doo humbly beseeche your hono^r to finish this good worke and at y^r convenient leysure to move her Ma^{tie} to license the same of one hundreth pounds or so manie marks at the leaste, by me, and others to be purchased in Mortmaine, for the increase of the stipends of the Schole M^r & Husher, & of the nombre & exhibition of the said Scholars and the better relieffe of the great companie of that poor College, and all to be done in her Maties name: and to cause the said Mortmaine to be entered in the blankes of the saede Patent,—Yo^r hono^r shall herby bynde not only me but all the Inhabitants of that rude Contrie of Lancashire and the Scholars of the saide College continually, next after her Ma^{tie}, to pray for your hono^r."

To the Right Honble and my singular goode Lorde,
 the L. Burghley, Lord Treasurer of England.

Indorsed 24 July 1572.

Letter of Dean Nowell to Lord Burghley, March 1594.

"MAY it please your Lordship favourably to hear mine and my Brother Robert's humble suit who specially charged me upon his death bed to procure the foundred of Myddleton Schole in the Countie of Lancaster whear we, & other or brethren were taught in our Childhoode, and the saide Schole to be annexed unto Brazen Nose College in Oxford, whear we were poor Students, in the tyme of our youthe, wch her Ma^{tie} by yo^r Lordships & Sir Walter Mildmays commendacon of my humble suite most gratioously granted & founded the Schole by

The cause was heard at the Rolls on the 16th December 1831, when a decree was pronounced, dismissing the information. The appeal was against this decree.

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“ the name of Queene Elizabeths free School in Myddleton, and
“ annexed, and gave the said Schole unto y^e Principal & Scholars
“ of Brazen Nose College in Oxford Governors of her Mat^{ties}
“ Schole aforesaide and did also give the Manor of Upbur ie &
“ parsonage of Gillingham impropriated in the Countie of Kent
“ unto y^e said College. The which Manor & psonage Sir Edward
“ Hobie Knight hath holden by coler of a Lease made by the L.
“ Cheyney, now bye the space of fyve years & more, so that now
“ he oweth to the said College above eight hundred pounds, for
“ some redresse whereof the said College was inforced to seek
“ their remedye by the Lawe (& & the Letter here goes into
“ details of the Suit). By means of all which longe suite and
“ delays contyning now fyve years & more. y^e t^lsaid College is
“ greatly impoverished & her Mat^{ties} xiiij poore Scholares are
“ shortly to forsake y^e Univsitie, & her Highness free Schole, so
“ lately by her gratusly founded is in danger to be dissolved
“ unlesse it might please yo^r honorable L. by your Authoritie
“ (which ye said Sir Edward doth most reverence) to bring him
“ to some reason: whereby three hundreth poor Scholers &
“ Students shall be bounden contynually to praye for your
“ good L.

“ Martij 1594.”

To the Right Honourable my verie good Lord, the
L. highe Treasurer of England.

Another Letter of Dean Nowell.

“ MY Brother Robert late Attorney of the Mat^{ties} Court of
“ Wardes about vi houres before he dyed, said unto me. Forget
“ not Myddleton Schole and the College of Brazen Nose, where
“ we were brought vp in our youth and yf yow wolde procure
“ any thyng to continue with my Money, yow shall doe it beste
“ & most surely in the Queens Mat^{ties} name, whose poore
“ Officer I have been.” And uppon these words I was occasioned
“ to thinke of the Foundation of Myddleton Schole and of certain
“ Scholars to be chosen out of that Schole into the College of
“ Brazen Nose — ther to be mayntened with certain exhibition.
“ And fyrste for three years space, before I obteyned the

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For the Appellants, Mr. *Bickersteth* and Dr. *Lushington*.

“ said foundation I sent yerely XX^{li} to the Principall & Fellowes
“ of that College to be bestowed upon VI poor Scholars.

“ And whan by y^r L & S^r Walter Mildmays meanes I had
“ obtained the foundation of the Schole, her Maiestie most
“ gratusly & bounteously gyving frely that XX^{li} yerely for ever
“ which I would have purchased of her Ma^{tie} I was thereby more
“ inflamed to go through with that, which I fyrst intended
“ wherefore to that purpose I purchased in reveraion of the L.
“ Cheyney the Manor of Uppebury with the parsonage of
“ Gillingham in the Countie of Kent which is worth one
“ hundreth marks or more yerely: for the which I paid my
“ Lord IX. C. lib. with a purse of XL^s to my ladie for her
“ consent.

“ And for that my L. Cheny hath reserved unto him selfe
“ the rente duryng hys lieffe, I prayed M^r Auditor Tooke who in
“ conson of a lease of Esyndon in the Countye of Hertford was
“ contented to pay me yearly the XV^{li} for the space of XVI years
“ to assure the same unto the College of Brazen Nose which I
“ do yerely make up to the Somme of XX^{li} to the use of VI
“ poor Scholars in the saide College named in the foundation
“ Queenes Elizabeth Scholars.

“ I have dealte with my L. Cheny to purchase hys Interest for
“ term of his lieffe that I might put the College in full possession
“ as well of the rent as of the Lands which yf I could compasse
“ this should be XIII Scholars found in Brazen Nose and the
“ Husher of the School hys Wages should be mayde upp X^{li}
“ which is yet but VI^{li} VIII^s IIII^d.

“ I had also buylded ere now a fayre Scholehouse with
“ lodgyngs for the Schole M^r & Husher savyng that youge M^r
“ Ashton Lord of Myddleton beyng under that Age can make
“ no Assurance of the Grounde, wherupon to buylde the same I
“ will bestow or leave to that vse whith the College vppon bonde
“ vf I die before, two hundreth marks at the leaste.”

“ And I payed to Mr. Henrie Poole of Dally in Leicestershyre,
“ who made a title to the said esyndon for hys interest CXX
“ lib. And for that the Lower Chambres of the College were
“ dampeshe and unholosome being unboorded, I caused the
“ same throgly to be boorded which cost above XL lib. The
“ mortmaynes, fines, licence of alienation, fees, fine, and

For the Respondents, Sir *E. Sugden* and Mr. *Bethell*.

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"recoverie of Uppberry and Gyllyngham wrytinge in sette hand of the frudation and twoe exemplifications under the great seale with other wrytyngs, cost above one hundredth pounds, as I have in particulars to showe."

In the same letter also there is the following erratum, viz. : — "for the which I paid my L. IX. ch. and X. li.;" whereas the original is "for the which I paid my Lord IX. C. lib. meaning 900*l.* sterling."

The following Letter or Petition of Dean Nowell, also formed part of the Respondents' evidence: —

"My humble dutie to your honorable Lordshipp remembred, might it please the same favourably to hear mine and my brother Robert's some time attorney in the Court of Wardes his humble suite in his last Will and Testament, by the wordes written in this schedule enclosed, who specially charged me uppon his death-bed to procure the foundred of Myddleton Schole in the County of Lancaster, whear we and other our brethren were taught in our childhoode, and the said Schole to be annexed unto Brazennose College in Oxford, whear we were poor students in the time of our youthe, which her Majestie by your Lordships and Sir Walter Miedmaye's commendation of my humble suite, most graciously granted: and founded the schole by the name of Queene Elizabeth's Free Schole in Myddleton, and anexed I gave the said Schole unto the Principal and Scholars of Brazennose College in Oxford, Governors of her Majestie's Schole aforesaid, and did also give the Manor of Upburie and Parsonage of Gillingham, unpropried in the countee of Kent unto the said College. The which Manor and Parsonage Sir Edward Hobie, Knt., hath holden by coler of a lease made by the Lord Cheyney now bye the space of fyve years and more, so that now he oweth to the said College above eight hundreth pounds, for some redresse whereof the said College was inforced to seek their remedye by the lawe, and dyd bringe an action against him in ye Court of Common Pleas for pte of ye said avverages to the value of V. C. lib. And when he for lacke of appearance was at the poynt of outlawrie, one Webb, as Attorney for the said Sir Edward,

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The points of argument for the Appellants not particularly noticed in the judgment were as follows: —

The funds were not vested in the college in their original corporate character, but by a new name and creation expressly as governors of the school: the only benefit given to or intended for the college was for the increase of commons: the gift of a part of the funds for a specified purpose, beneficial to the college, necessarily excludes the hypothesis that any other part could be intended for their own use, or could be so held and applied by them without a breach of trust; on the other hand, as to the stipends payable to the poor scholars, a power is given to increase them from time to time, and all the provisions as to future property must apply to the second as well as to the first letters patent: all the funds of the charity

“appeared for him. And after when the judgment was past
 “agaynst Sir Edward, ye said Webb in open Court uppon his
 “Oathe denyed that he had any warrant so to appeare for hym
 “and thereby hath overthrowne their long and chargeable suite
 “in lawe. By means of all which longe suite and delayes
 “contynuing now fyve years and more, ye said College is
 “greatly impoverished, and her Majestie XIII teen poore
 “Scholares are shortly to forsake ye Univastie, and her
 “Highness’ Free Schole, so lately by her gratically founded
 “is in danger to be dissolved, unlesse it might please your
 “honourable L. by your authoritie (which ye said Sir Edward
 “doth most reverence) to bring him to some reason whereby
 “three hundreth poore Scholars and Students shall be bounden
 “continually to pray for your good L. unto Almighty Godd
 “who have ye same and all yours in His most blessed keepinge
 “and protection.

“To the right honourable my verie good Lord the
 L. highe Treasurer of England.”

Martij 1594

“Your honourable Lordshipps humble at comandent

“ALEXANDER NOWELL.”

were not of the gift of Dean Nowell, which displaced the ground of argument assumed from his alleged permission to divert the funds from the uses prescribed by the letters patent; but if he had been the sole benefactor and founder of the charity he could not alter the conditions imposed on the funds by the terms of the grant. The gift of the funds was the consideration moving to the Crown for the grant made by the letters patent,—and the foundation of the charity. This was the advantage gained by the donor, and after the gift he could have no other powers over the funds than such as were specially given by the charter. The argument derived from the danger to other colleges is groundless. Their splendour and dignity ought not to be maintained by the violation of charters and breach of their duties, and if the example and the effect upon other cases of the decision upon this appeal is to be pressed into the argument, the reversal of this decree will enlarge the sphere and increase the benefits of education, and thereby add to the real dignity and usefulness of the colleges in all the universities.

For the Respondents the argument was substantially to the same effect as set forth in the answer.

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The *Lord Chancellor*.* — This is a case of very great importance both in itself and in respect to the principle which it involves, and I certainly shall crave your Lordships' permission to take some time in considering further, not only the very able and pregnant arguments urged at the bar, of which I

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* At the conclusion of the argument.

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have taken a very full note, but also the statement in the information and answers, and the appendix to the printed cases upon either side, which bring the whole case before the Court very distinctly and very fully.

I lean very much to the argument, that if this decision is reversed it is difficult to see how other decisions upon this subject should have been reversed: but, however, that is a question amongst others, which I will turn in my mind. I also think that if this decision is reversed it will be difficult for some of the colleges, if not for all the colleges, to retain the funds administered by them according to their present application. Considerable changes would be introduced in what is understood to be the known rights of those bodies in the enjoyment and in the administration of the funds committed to their charge. It is alleged that there is no discrepancy between this decision and the decisions formerly pronounced in the Court of Chancery, and the possibility of reconciling the reversal of this judgment with those decisions in the Court below is questioned. But the Appellants do not appear to go so far as to say that there is any decision in the Court below, or any case of any description, any authority whatever, which would be absolutely repugnant to the affirmance of this decision. The Respondents have said that a reversal would be to alter the decisions already made in these cases; for the Appellants it is not contended, as I understand the argument, that the affirmance of this decision would involve a repugnance to any former decision, or a departure from any principle, recognized either by *dicta* or by the authority of text writers. So far the two arguments may be said

to stand on somewhat different and considerably unequal grounds, — grounds different in point of level, if I may so speak; the position occupied by the Respondents in this material respect, in point of authority, being considerably higher than the position taken, and candidly taken, for they can take no other, on the part of the Appellants. These will be matters which will require my most anxious consideration. It is important not only from the present stake, but from the principle which is involved. There is no advantage in my going into the matter at present; the facts are not such as require any investigation, so as to make it fit and proper to have counsel on both sides come to an agreement upon them — they are admitted on both sides. The question upon the argument is an inference from these facts. I shall content myself with begging your Lordships to postpone this indefinitely. I trust I shall be able to advise your Lordships upon it before the end of the session, but it should not prevent my disposing of several cases which now wait your Lordships' judgment. In taking up one case before another, I naturally feel anxious to dispose of those first where there is a great complication of facts and circumstances; it is highly expedient that the mind should be applied to those cases while the arguments and statements are fresh in the recollection; but it is not so material in a case like this, where the question goes on the principle, the facts being admitted: I shall therefore postpone this case until after I have disposed of three or four other cases.

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The *Lord Chancellor*. — The case of the Attorney-General and Brazen Nose College is the first

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of those which now stand in the list for judgment. It was argued with the fulness and learning and ability which your Lordships are accustomed to see applied to cases at your Bar, and the application of which was especially merited by the importance of this case, not only in itself involving a considerable interest to the College but involving a very great deal of principle, which might have operated by way of precedent in other cases independent of its own importance. It will not be necessary for me to enter very minutely into the argument, because, on the whole, I agree, without hesitation, in the decision of the Court below; nevertheless I shall state my reasons.

The charity was founded in the 14th of Elizabeth, the 11th of August, 1572, and it may be said to have been in some sort a joint foundation by Alexander Nowell, Dean of Saint Paul's, a great benefactor and one of the governors and visitors, and of her Majesty Queen Elizabeth. The object of the foundation was the restoration and the reinstatement of the school of Middleton, in Lancashire, as a free grammar school; and this is effected by incorporating the master and the school, and making it a corporate body by appointing governors and visitors the master and six senior scholars, fellows of Brazen Nose College, Oxford, and incorporating them also as a body-corporate, under the title of the master and six senior scholars, fellows of King's College, Brazen Nose, Oxford, governors of Middleton Grammar School. It then points out that six scholarships shall be appointed to Brazen Nose, either from Middleton School, the school of Whalley in Lancashire, or the school of Burneley in Lancashire, and failing all these three, from other

schools in Lancashire; that they shall be chosen by the master of the College; and power is given to this master and six senior scholars, fellows, the governors of the school, with Dean Nowell, during his life, and, after his decease, solely to make ordinances for governing the school and scholars, and concerning the stipends and salaries of the said masters of the free grammar school aforesaid, and also touching any thing whatsoever relating to the said school in the order, governance, receiving, and disposition of the rents and revenues for the support of the school and scholars.

This is a very important part of the endowment; for it appears to me, upon the authority and principle of adjudged cases, and one which I very lately decided in the Court of Chancery, proceeding on the same principle, the Atherston School case, in which I reversed the judgment of the Court below, where due attention had not been given to such provisions as appeared to me of the utmost possible importance to the main question now in agitation between the parties, to wit, whether the whole is given to the school out and out, or whether the school has only a charge upon the revenues in a certain way, but at the discretion of the governors, and whether, in such case, the surplus does not belong as property to the governors. By these letters patent rents of considerable value are given to the governors *ea tamen intentione*, with this intent, however, that out of the same they should give to the master twenty marks by the year "at the least," to the undermaster ten marks by the year "at least," and to six poor scholars five marks by the year, but not at the least. The *minimum*, as a yearly stipend, to

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the master and usher of the school, respectively, is to be twenty and ten marks, but there is no *minimum* fixed as to the scholars. It is stated to be five marks to the scholars, and, so far, I state this as operating to a certain degree (though it was not much relied on at the bar) in favour of the argument of the Respondent; nevertheless it is nothing decisive, for it must be observed that these scholars had nothing to do with Middleton Grammar School at all; nothing exclusively, for they may belong to Whalley or Burneley; nor in the event of neither Whalley or Burneley furnishing objects of charity, to make those scholars to Brazen Nose sufficient, and exhibitions and scholarships might be given to whomsoever (that has been the practice formerly) the College should choose.

Then a liberty, very important to be observed upon, is further given to hold other grants in mortmain, not exceeding 100*l.* a year, for the support of the school, but not of the school alone, but also for the support of the poor scholars of the said College of Brazen Nose. That is the second observation which I have to make, as shewing, distinctly, that the contemplation of the Queen and the founder was not confined to the school of Middleton only, as it is now contended that the endowment does confine it. During Dean Nowell's life he acted as visitor, and he was, to a great degree, the founder; and during the whole of that time with his knowledge, with his consent, with his participation, the surplus was applied to the use of the College, and even the stipends of the scholars, when there was a want of objects, that is to say, when they could not get in any way six poor scholars, the funds, originally destined for those poor scholars, were applied

to the use and benefit of Brazen Nose College, without the least reference to Middleton School. One other fact being stated, I have done as regards the facts of the case: The rents at that time, by the foundation, were at the very least (for that is the *minimum*) 66*l.* 13*s.* 4*d.* a year; summing them up you will find that the charges upon this fund were not 66*l.* 13*s.* 4*d.* but 65*l.* 3*s.* 4*d.*, leaving a clear surplus ungiven away, unappropriated by the foundation, not referred to in any way by the gift, except by a resulting gift to the donees, the governors, namely, 1*l.* 10*s.* This is said to be a trifling amount; I do not so consider it; trifling amount now it may be, but of no such trifling amount then when I find that which was 66*l.* 13*s.* 4*d.* in the 14th Elizabeth is now by the very argument on the part of the Appellants, on which they mainly rely, swelled to somewhere between 700*l.* and 800*l.* a year; I must consider that we are to multiply 1*l.* 10*s.* by something like 14 or 15, and that brings us up to between 20*l.* and 30*l.* It is therefore not only not inconsiderable, regard being had to the value of money, but you must consider the proportion it bears to the whole income.

Upon all these grounds, therefore, I found my first observation, namely, that this is not within the principle, or the rule of the Thetford case, now the governing authority in all such questions. The Thetford case is reported in Lord Coke's reports: it is also to be found reported in Duke, but not so correctly. I make this remark, because Lord Eldon, in some of the charity cases that came before him, commenting on the Thetford case, is led into an error respecting the nature of that case; and, upon examination, it is quite clear he is led astray by

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having taken the case from Duke and not from Coke; thinking that Duke gave the report (as he generally does) in the same terms as Coke, Lord Eldon conceived he might safely take it there: it is accurately given in Coke, it is not so accurately given in Duke; and upon the difference between the two reports hinges almost entirely, in my opinion, what I venture, with great respect to that noble and learned Lord, to state to be an erroneous view which he took of the Thetford case.

The Thetford case goes on this principle: it lays down that where nothing is said of surplus (for it is only in cases where nothing is said that the question can arise), then you may safely assume that it is given to the charity out and out, and not to the trustees; that is, if it is exhausted by the gift to that charity. Suppose, for instance, as in the Thetford School case, I gave land to the amount of 20*l.* by the year (stating the revenue) to A. and B. in trust for the charity C., if I give 15*l.* to one, 3*l.* to another, and 2*l.* to a third master, or other party within the scope of the charity, and will and declare that those three sums 15*l.* a year, 3*l.* a year, and 2*l.* a year respectively, shall at all times be paid to such persons; as those sums, taken together, amount to 20*l.* which is all given to the trustees A. and B. for the use of the charity, the rule of the Thetford case is this, that this exhaustion of the fund indicates the mind of the donor or the founder's intention, that the whole should be for charity, and that no part should be beneficiary to the trustees. Such a disposition raises an implied trust for the school *quoad* any future contingent surplus; it disposes of all possible surplus, and leaves no question of this description ever to arise in such a case. But it is very

different when instead of giving 15*l.*, 3*l.* and 2*l.*, I give 15*l.* and 3*l.*, and leave 2*l.* unappropriated, then the rule of the Thetford case does not apply: as there is an unappropriated surplus the argument fails, and the principle and the rule derived from that case fail also. The surplus of 1*l.* 10*s.* not given, takes it out of the rule of the Thetford case, and leaves it to rest on the other and general principles governing such questions.

The question then arises, What is the intention? I infer the intention from the other circumstances which I have already stated, namely, that Middleton School is not the only object of the bounty; the six scholarships to Brazen Nose are not to be taken from Middleton School lads solely, but may be taken from Whalley and Burneley, which are not mentioned in the endowment, and failing, Whalley and Burneley may also be taken from other schools. The other circumstance, of a similar description, is that the poor scholars of Brazen Nose (quite independently of Middleton, or even Whalley or Burneley, or even Lancashire scholars at all,) are to receive the benefit of the other lands, to the amount of 100*l.* a year, to take and hold which in mortmain licence is also given.

Another circumstance leading to the same conclusion is this, that the rules, regulations, and ordinances which the governors are empowered to make are perfectly general, all matters touching the school and its concerns; they are from time to time to be varied, and they are to be specifically directed to the revenues, receipt, management, and disposition of the said revenues.

Last of all comes the lapse of time; 250 years have elapsed since the foundation of the school,

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and there is no trace pretended to be visible of any other application of the surplus except to Brazen Nose College. This may not be decisive, but it is very strong, and goes very far indeed, as I shall have occasion to shew in the next case of *The Attorney-General v. Hungerford*, to which, therefore, I adjourn that remark. It raises not a bar but a great obstacle to any alteration to be made in the practice respecting the distribution of the fund. The Coventry case *, the case of the *Attorney-General v. The Mayor of Bristol*, and other cases, to which I might refer, both recent and less recent, clearly bear out the principle on which this decision has proceeded, and therefore I have no hesitation whatever, though without costs, in moving your Lordships that this decree be affirmed.

* 2 Vern. 397., and in D. P. 7 Bro. P. C. 235.

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IRELAND.

(COURT OF CHANCERY.)

The Right Honourable FRANCIS
BLACKBURNE, His Majesty's At-
torney-General for Ireland, at
the relation of WILLIAM CHARLES
QUIN, Esq. Secretary to the
Commissioners of Education in
Ireland - - - - }

Appellant;

THOMAS WILLIAM HUNGERFORD,
GEORGE CHARLES JEFFRIES, C. H.
SAINT JOHN, Earl O'NEILL, JOHN
L. BRODERICK, HENRY Earl of
SHANNON, GEORGE Viscount MID-
DLETON, The Right Rev. SAMUEL,
Lord Bishop of CORK, THOMAS
POOLE, Esq., and the Commis-
sioners of Education in Ireland - }

Respondents.

In the year 1710, lands in Ireland, having recently before they were vested in trustees for a charity been let for 100*l.* per annum, which as far as appeared was a fair rent, were leased by the trustees at the same rent, for a term of three lives, upon a premium of 300*l.*, with a covenant for perpetual renewal upon the dropping of a life, paying 25*l.* for each renewal. In 1782 the lease was renewed upon payment of the fine.

Upon information filed to rescind the lease: Held, under the circumstances, the state of Ireland at the date of the original lease, the practice of the country relating to such leases, and the long acquiescence, that the interest of the lessee ought not to be disturbed.

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ELIZABETH Countess of Orkney, before her marriage with George Earl of Orkney, by indentures of lease and release, bearing date on the 22d and 23d days of November, in the year 1695, and made between the Countess, by the name of Elizabeth Villiers, of the city of Westminster, spinster, of the first part; the said Earl, by his then name of the Honourable George Hamilton, of the second part; and the Right Honourable Edward Lord Viscount Villiers, eldest brother of the said Elizabeth Villiers, and Thomas Broderick, Esquire, of the third part, conveyed to Lord Viscount Villiers and Thomas Broderick, and their heirs, all her estates in the kingdom of Ireland, with the appurtenances, upon the several trusts and to the intents and purposes declared in and by one indenture tripartite, bearing even date therewith, and made by and between the same parties.

By the indenture so referred to, it was declared and agreed as to the several honours, manors lands, tenements, and hereditaments therein mentioned, whereof the lands and hereditaments herein-after named were parcel, that the said Lord Viscount Villiers and Thomas Broderick, and the survivor of them, and the heirs and assigns of such survivor, should from time to time, and at all times thereafter, grant and convey the same to such uses and purposes, and subject to such charges, provisions, conditions, limitations, and power of revocation and limitation of new uses and estates, as she the said Elizabeth Villiers from time to time, whether under coverture or sole, by any writing or writings by her signed in the presence of two or more credible witnesses, or by her last will and testament in writing,

signed and attested as aforesaid, should direct and appoint.

By indentures of lease and release, the release bearing date the 23d day of October in the year 1696, made between the said George Earl of Orkney of the first part, the said Elizabeth Countess of Orkney, his wife, of the second part, the said Lord Viscount Villiers and Thomas Broderick of the third part, and Allan Broderick, Esquire, then his Majesty's Attorney-General in Ireland, and Laurence Clayton, Esquire, of the fourth part, reciting, amongst other things, that the said Countess was resolved to erect and found a school-house with all suitable conveniences in the town of Middleton, in the barony of Imokelly and county of Cork, and to establish a free-school there, and to endow the same with a perpetual maintenance for the education of youth, with exhibitions to be allowed to certain persons at the university who should have their education at the said school, according to such rules, statutes, and ordinances as the said Countess should make, or in case of her not doing so, as the greater number of the governors of the said school should make; and that in the mean time the said persons, or the major part of them, should, when the said school was in readiness for the reception of scholars, or sooner if they should see occasion, appoint a head schoolmaster of the said school, and an usher under him, and a master to teach to write and cast accounts, unless the said governors, or the major part of them, should find out a person qualified to undertake both the said employments of usher and writing master; and that after the expenses of building the said school-house, out-houses, and other conveniences

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should be paid, there should be yearly paid to the schoolmaster the sum of 100*l.*, to the usher the sum of 20*l.*, to the person who should teach writing and casting accounts, whether the same person that was usher, or another, the sum of 20*l.*, and that the sum of 10*l.* per annum should be laid by every year as a fund for repairs to the school-house and other houses, and for contingent charges, and that the sum of 50*l.* per annum should be paid as exhibitions to scholars at the university, who had been educated at the said school, in such proportions and for so long time as the major part of the governors for the time being should direct, no one exhibition to exceed 15*l.* per annum; and until there should be such scholars who, in the judgment and opinion of the major part of the governors, should be deserving of such allowance, the same should be employed for such other charitable uses and purposes in the said town of Middleton, or near the same, or elsewhere within the said kingdom of Ireland, as to the said governors for the time being, or the greater part of them, should seem best; and that in the first place the rents, issues, and profits of the said lands and premises should then immediately go and be applied towards the purchasing and preparing a fit and convenient place and materials necessary for erecting a school-house and other fitting houses and conveniences for the master, usher, and boarders, and for and towards the building the same in such part of the said town of Middleton, and after such manner and form, as she the said Countess, or such other person or persons whom she had or should depute for that purpose, should order and direct: It is by said last-mentioned indenture of release witnessed, that for the purposes

therein mentioned she the said Elizabeth Countess of Orkney, with the concurrence of the said Earl her then husband, according to the said power to her reserved, and by virtue of all and every other powers and authorities, did thereby declare, limit, and appoint that the said Edward Lord Viscount Villiers and Thomas Broderick, and the survivor of them, his heirs and assigns, should and might grant and convey unto the said Allan Broderick and Laurence Clayton, and their heirs, her said estates in Ireland by the name and description of the towns and lands of Dowlas *alias* Dringas, containing by estimation 257 A. 1 R. 8 P.; the lands of Ballylehortig, containing by estimation 114 A. 1 R. 14 P.; the lands of Ballyrenegan, containing by estimation 393 A. 0 R. 14 P.; the lands of Ballynemaule, containing by estimation 163 A. 0 R. 32 P.; the lands of Ballydonagha, containing by estimation 40 A. 2 R. 4 P.; and the lands of Tullaghloane *alias* Tullaghlane, containing by estimation 64 A. 3 R. 24 P.; all which said lands and premises are situate in the barony or baronies of Kinnelea and Kirrecurry, in the said county of Cork; and all other the towns and lands within the said barony or baronies formerly leased to Sir John Meade, Knight, by the then late King James the Second, when Duke of York, at the rent of 100*l.* per annum; and also the towns and lands and hereditaments of Kilgobbin and Ballyscobeg, situate in the barony of Carbery and county of Cork, containing by estimation 851 A.; and all other the towns and lands within the said barony of Carbery formerly let unto William Woith, Esq. by the then late King James the Second, when Duke of York, at the yearly rent of 104*l.*; to hold the same, with the appurtenances,

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to the said Allan Broderick and Laurence Clayton, their heirs and assigns for ever; but upon trust from time to time for ever to dispose of all the rents and profits thereof towards the purchasing and providing a convenient place and materials for the building of a school-house and other fitting houses and conveniences for a master and the usher, and for the reception of boarders and scholars, and such other suitable accommodations and buildings within the said town of Middleton, and in such manner and form, as should from time to time be ordered and directed by the said Countess, or by such person or persons as should be nominated by the said Countess for that purpose; and after the said school and school-house and other buildings and accommodations should be finished, and the charges thereof fully satisfied, then for and towards the payment and discharge of the respective allowances, salaries, and pensions therein and herein before mentioned; and the said Countess of Orkney did thereby appoint the said Thomas Broderick to frame models and contract for ground, materials, and other necessities, and to do all other things in order to the finishing the said school-house and out-houses and conveniences at Middleton aforesaid, and she thereby directed that the rents, issues, and profits of the said premises should be paid to him, or to such other person as he should depute for that purpose; and the said Countess did thereby further direct and appoint that the said George Earl of Orkney, William Earl of Inchiquin, Thomas Broderick, Laurence Clayton, Allan Broderick, and Samuel Maynard, Esq., and Lieutenant Peter Bettesworth, and their heirs, together with the Bishop of Cork and the Sovereign of Middleton for the

time being, should be governors of the said school, and the revenues thereof, and that they or their successors, or the major part of them who should happen to be present there from time to time, in case the said Countess should not frame and establish orders and rules for the government of the said school, and the disposition of the revenues of the said estates, should make such rules and regulations from time to time as they should find convenient, and that the Bishop of Cork and the Sovereign of Middleton for the time being should be always governors of the said school and revenues; and that upon the death of any of the said governors, the major part of the surviving governors happening to be present should elect a new governor or governors in their place: And the said indenture further witnessed, that the said Edward Lord Viscount Villiers and Thomas Broderick, in pursuance of the before-mentioned directions of the said Countess of Orkney, and in execution of the trusts in them reposed, did grant and convey unto the said Allan Broderick and Laurence Clayton the said towns, lands, tenements, hereditaments, and premises, to hold the same unto them and their heirs and assigns for ever, to the intents and purposes and upon the trusts therein specified.

The deeds did not appear to have been enrolled, and could not be found.

By an indenture of release bearing date the 26th of March, 1703, made between Sir Cyril Wick, Knight, Francis Annesley, John Baggs, John Trenchard, John Isham, Henry Langford, James Hooper, John Carey, Sir Henry Sheare, Knight, Thomas Harrison, William Fellows, and Thomas Rawlings, surviving trustees nominated and appointed for

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putting in execution the powers and authorities enacted in and by a then late act of parliament made in England in the eleventh and twelfth years of the reign of King William the Third, entitled "An Act for granting an Aid to his Majesty by Sale of the forfeited and other Estates and Interests in Ireland, and by a Land Tax in England," for the several uses and purposes therein mentioned, of the one part, and the before named Allan Broderick and Laurence Clayton of the other part, after in part reciting the said several deeds, and also reciting that the said lands, tenements, hereditaments, and premises in and by the said deed of 23d of October, 1696, granted and conveyed to the said Allan Broderick and Laurence Clayton, and their heirs, being part of the inheritance called the private estate of his then late Majesty King James the Second, were amongst other lands by the said act of Parliament vested in the said Sir Cyril Wick, Francis Annesley, John Baggs, and the other persons therein named trustees, to the several uses and upon the trusts in the said act particularly mentioned, and that all grants before made thereof, or any part thereof, by his said then late Majesty King William, to any other person, were made void; and further reciting, that by one other act made in England in the first year of the reign of her then Majesty Queen Anne, for relief of Francis Spring and other Protestant tenants of the forfeited estates in Ireland, in respect of the real improvements, and for confirming a Protestant settlement at Portarlinton, and of a charity at Middleton in the county of Cork, and other purposes: It was amongst other things enacted, that the said trustees, or any seven or more of them, were thereby

required to make good and sufficient conveyances of all and singular the premises with their appurtenances unto the feoffees therein mentioned, and their heirs, to the uses in the said conveyance made by the said Countess of Orkney mentioned, they the said Sir Cyril Wick, Francis Annesley, John Baggs, and the other trustees therein and herein before named, did, by the last mentioned indenture, release and confirm unto the said Allan Broderick and Laurence Clayton, and their heirs, the said towns, lands, tenements, hereditaments, and premises granted and conveyed by the said recited indenture of release of the 23d of October, 1696, to hold the same unto them and their heirs and assigns for ever, to the intents and purposes therein and herein before declared and limited.

Allan Broderick and Laurence Clayton accepted of the trusts so as aforesaid vested in them by the said indentures of the 23d of October, 1696, and 26th of March, 1703, and entered into the possession or receipt of the rents, issues, and profits of the said lands, tenements, hereditaments, and premises, and erected a school-house and other necessary buildings as directed by the said Countess of Orkney in the deed of the 23d of October, 1696, and a head master, an usher, and a writing master were appointed by the governors of the school, or the major part of them, and the school was carried on for many years in the manner directed by the deed.

On the 19th day of October in the year 1710, a lease was made and executed by and between the said Allan Broderick and Laurence Clayton, under the description of trustees appointed by the deed of the Earl and Countess of Orkney for erecting

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a free-school at Middleton, of the one part, and Francis Daunt, Gentleman, of the other part; whereby the said Allan Broderick and Laurence Clayton, in consideration of the sum of 300*l.* sterling to them paid as a fine by the said Francis Daunt, and of the rents and covenants in the said lease reserved, did demise and set unto the said Francis Daunt, the said towns and lands of Ballyregane, Clagheen, Dirrinagash, Ballinamaule, and Ballynvenertigg, containing by common estimation four plough lands with the appurtenances, to hold the same unto the said Francis Daunt, his heirs, executors, administrators, and assigns, for the life and lives of Richard Daunt and William Daunt, sons of the said Francis Daunt, and the life of one Henry Daunt, and of the survivor and survivors of them, at the yearly rent of 100*l.* sterling, payable half yearly, on the days and times and in the manner therein mentioned, and which said lease contains a covenant on the part of the said Allan Broderick and Laurence Clayton, their heirs and assigns, to renew the said lease from time to time for ever, on the payment of the sum of 25*l.* as a renewal fine on the fall of each life, and that the said Allen Broderick and Laurence Clayton stood seised of no other estate therein than that which passed unto them by virtue of the said conveyance made by the said Earl and Countess of Orkney to them as trustees for erecting the free-school at Middleton, which was confirmed by the said then late act of Parliament.

By another indenture of lease, dated the 26th day of April in the year 1712, Allan Broderick and Laurence Clayton demised the residue of the lands to one Thomas Hodges and William Ware,

and their heirs for three lives, with a like covenant for perpetual renewal at the like rent of 100*l.* a year.

Francis Daunt, under the before mentioned lease, entered into the possession of the lands and premises thereby demised to him, and he and those deriving under him continued to enjoy the same, and paid the rent reserved by the lease to the persons from time to time authorised to receive the same.

The several persons named as governors died, leaving George Earl of Orkney the survivor, and after his death, George, then Lord Viscount Middleton, was duly elected a governor in his place, and the Right Honourable, then Lord Shannon, Lord Inchiquin, Lord Viscount Middleton, Henry Lord Boyle, afterwards Earl of Shannon, and the then Lord Bishop of Kilmore, were at different times duly appointed to be governors upon the death of other governors according to the provisions of the deeds. And Henry Earl of Shannon and George Lord Viscount Middleton were the only persons appointed who were living.

Allan Broderick survived Laurence Clayton, and became seised of the reversion of and in the said lands and premises, and was afterwards created Lord Viscount Middleton

By an indenture, bearing date on the 18th of June in the year 1782, and made by and between George Charles Jeffreys by his guardian Arabella Jeffreys of the city of Dublin, widow, John O'Neill, then of Shanes Castle, in the county of Antrim, Esquire, afterwards the Right Honourable John Lord Baron O'Neill, and the Reverend Laurence Broderick, Doctor of Divinity, and Jane Broderick his wife,

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of the one part ; and George Daunt and William Fuller Daunt, Esquires, of the other part ; after reciting the lease of the 19th of October, 1710, and that the fee simple and inheritance of the said lands and premises was then vested in the said George Charles Jeffreys, John O'Neill, and Jane Broderick as the heirs-at-law of the said Lord Middleton, who had survived the said Laurence Clayton, and that the estate and interest of the said Francis Daunt had become vested in the said George Daunt and William Fuller Daunt, who were then entitled to the said lands and premises, and to the benefit of the covenant for renewal contained in the said leases ; they the said George Charles Jeffreys, John O'Neill, Laurence Broderick and Jane his wife, for and in consideration of the said sum of 25*l.* as a renewal fine, and for the other considerations therein mentioned, demised, granted, and set the said several towns, lands, hereditaments, and premises comprised in the said lease of the 19th of October, 1710, with their appurtenances, unto the said George Daunt and William Fuller Daunt, their heirs and assigns, for the lives and life of the said George Daunt and William Fuller Daunt, and George then Prince of Wales, afterwards King George the Fourth, and the survivors and survivor of them, at and under the said yearly rent of 100*l.*, and the indenture contained a covenant for the perpetual renewal of the lease on payment of a fine of 25*l.* on the fall of each life.

George Daunt and William Fuller Daunt, continued from the date and execution of the last-mentioned lease or renewal in the receipts of the rents, issues, and profits of the lands and premises therein comprised during their respective lives, and

George Daunt having died on the 5th of May, 1814, all his estate and inheritance in the lands and premises became legally vested in William Fuller Daunt, who continued seised and possessed thereof during the term of his life. William Fuller Daunt died in the year 1815, and thereupon the lands and premises, and all the estate, term, and interest of William Fuller Daunt thereto, became vested in his only child and heiress-at-law, Joanna Hungerford otherwise Daunt, the wife of Thomas Hungerford, Esquire. Joanna Hungerford died in the year 1825, leaving Thomas William Hungerford, her only child and heir-at-law, who thereupon claimed to be seised of the lands and premises, and to be entitled to the benefit of the covenant for renewal contained in the lease of the 19th of October, 1710, and he accordingly entered into and continued in the receipts of the rents and profits of the lands and premises.


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The surviving governors of the school were the Right Honourable Henry Earl of Shannon, George Viscount Middleton, the Right Reverend Samuel Kyle, now Bishop of Cork, and Thomas Poole, Esquire, Sovereign of Middleton.

The Appellant, on the 16th day of April, 1828, exhibited his information in the High Court of Chancery in Ireland, against Thomas William Hungerford, George Charles Jeffreys, Charles Henry St. John Earl O'Neill, John Laurence Broderick, Henry Earl of Shannon, George Viscount Middleton, the Right Reverend Samuel Lord Bishop of Cork, Thomas Poole, Esquire, Sovereign of Middleton, and the commissioners of education in Ireland, thereby stating the several matters hereinbefore mentioned and particularly that from the

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Smallness of the reserved rents in the two leases, the exhibitions to scholars from the school, many years ago, were greatly diminished in number and amount, and for some years past had been entirely given up, and the 50*l.* provided for the same by the said deed had been from time to time applied to the repair of the school-house and buildings along with the yearly sum of 10*l.*, but both had been quite insufficient to keep it in repair, and in consequence thereof the school-house and the buildings attached thereto, for several years past, had been in a very dilapidated and ruinous state, and totally unfit for the uses and purposes for which they were originally intended, and the salaries originally appointed for the master and ushers were too small for efficient and respectable persons filling these offices; in consequence of which several circumstances, the number of boys boarded and taught thereat, which formerly amounted to from seventy to eighty, or thereabouts, gradually diminished, and for some years past there had not been any scholars educated at the school, and that the school and charitable establishment could be no longer sustained, if the leases should be allowed to stand and be perpetually renewed.

The information prayed that the lease of the 19th of October, 1710, and the new lease of the 13th of June, 1782, might be set aside and decreed fraudulent and void, and in violation of the trusts reposed in the persons who made the same, and be delivered up to be cancelled, and that an account might be taken of the rents, issues, and profits of the said lands from such period as it should appear that the rents thereof had been received, and that if necessary new or additional governors might be ap-

pointed, according to the provisions of the deed of 1696, and the trusts thereof be carried into full and complete execution, and that the said lands might be set again for proper terms of years at a full and fair value, and that the said rents in arrear, and the rents to be received in future on the new letting, might be applied first to put the said school in repair, and afterwards to keep it in good repair, and to the other purposes mentioned in the said deed of 1696, and that pending this cause a receiver might be appointed to receive the rents, issues, and profits of the said lands and premises, and that if necessary it might be referred to one of the masters of this Court to approve of a proper scheme for the management of the said school, and the application of the said rents, issues, and profits thereof, and that informant might have such further and other relief in the premises as the nature of his case might require, and should be agreeable to equity and good conscience.

The Defendant Thomas William Hungerford, a minor under the age of twenty-one years, by Thomas Hungerford, his guardian, answered the information, on the 17th of January, 1829, insisting that from the nature of the estate given to the trustees they were invested with absolute power to deal with the property as they thought best for the benefit of the foundation, and that their solemn acts done with the knowledge and according to the wishes of the founders of the charity ought not to be impeached, especially at this distance of time, otherwise than by clear substantial proof of fraud; and that the original trustees were men of elevated rank and stations,—one of them the Attorney-General of Ireland, and subsequently Lord

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Chief Justice of her Majesty's Bench, and Lord Chancellor of Ireland; and the other a gentleman of the highest character and respectability in the county of Cork, and the grandson of the Lord Egmont; and that the taking of fines on the making of original leases did not afford any argument of fraud in the trustees or the lessors; on the contrary, that the monies taken upon the fines enabled the trustees more effectually at once to carry into execution the intention of the founders, who, having reserved to themselves power to make bye-laws and statutes for the regulation of the school, must have been anxious to put it in operation with all convenient speed; that it must have been highly beneficial to the charity to obtain the command of a sum of money to erect the necessary buildings, and meet the other expenses of opening the establishment; that the lease was made by virtue of full powers vested in the trustees, who even entered into personal covenants to that effect with the lessee; that at this distance of time it must be presumed that the lands were set with due caution on both sides, due regard to the interests of the foundation and their own responsibility; that Francis Daunt must have stood in the relation of a purchaser for full value when he advanced so large a sum of money and bound himself by a perpetual covenant to pay renewal fines; that it was incumbent upon the informant to establish by the clearest evidence that the lease was made at a gross under-value and from fraudulent motives; that the decline of the school was owing to the appointment of the present master, and not to the existence of the leases, and that it had lost its character before the school-house fell into decay; that the

salaries were sufficient to provide a good master or ushers, with the advantage of private scholars, as had formerly been the case when it was a favourite establishment of high repute in the south of Ireland; and that the making leases in perpetuity or for very long terms was a mode of setting lands then usually adopted by great landed proprietors in Ireland, in consequence of the frequent disturbances in that country, and from the difficulty of procuring solvent tenants of the Protestant religion to expend money in improvement of lands on short leases, and that in consequence thereof leases for lives with covenants for perpetual renewal were granted in many parts of Ireland, and that the very great increase in value of lands in Ireland about the close of the last century was owing to the expenditure of capital of such lessees who became local proprietors, and represented the absentee head landlords; that the rent reserved upon the said leases made by the trustees was a fair rent, taking into consideration the fines, and that the advance of the fines was adequate to any increase of the value of the lands in 1710, compared with the lease stated in the information to have been made by King James; and the Defendant submitted that it would be most unjust to disturb those leases, out of which many subordinate interests had been derived, and on the faith of which various family settlements had been made, and also submitted that with proper management the rents and fines would have been sufficient for the purposes of the trust.

The other Defendants also answered the information, and the Appellant having replied, the Respondent and said other Defendants rejoined, and issue being joined, witnesses were examined both

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on the part of the Appellant and of the Respondent, and publication having passed, the cause was set down for hearing by the Appellant, without having made any of the persons holding by lease under the Respondent, parties to the cause, and also, without making the representatives of Samuel Daunt, who was entitled to a perpetual rent-charge of 85*l.* out of the said lands' parties.

The cause was heard before the Chancellor of Ireland on the 19th and 20th of December, 1831, and on the 30th of January, 1832, his Lordship decreed, that as between the Appellant and the Defendant Thomas William Hungerford, the information in this cause should be dismissed without costs, and that as to the Defendants Charles Henry St. John Earl O'Neill, George Lord Viscount Middleton, Henry Earl of Shannon, Thomas Poole, John Laurence Broderick, and Samuel Lord Bishop of Cork, the governors and trustees of the school, they should have their costs of the suit against the Appellant.

The appeal was against this decree.

For the Appellants, Sir *E. Sugden*,

For the Respondents, Mr. *Knight* and Mr. *Walpole*.

The dictum of Lord Eldon in *The Attorney-General v. Brooke*, 18 Ves. 326., was cited for the Appellants as conclusive, that trustees of a charity have no authority to grant a lease of the lands held in trust with a covenant for perpetual renewal. At the conclusion of the argument the Lord Chancellor said that such a lease might not be valid in England; but that the case of lands in Ireland might be different, and that he was de-

sirous of knowing the grounds on which the judgment in the Court below proceeded.*

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The *Lord Chancellor*. — My Lords, in the judgment in the last case (*The Attorney-General v. Brazen Nose College*) I stated to your Lordships that I should have occasion in commenting upon this case to mention more specifically the true effect in contemplation of the law, as administered in our Courts of Equity, of lapse of time in matters of charity, and this opportunity is afforded me in the facts of the present case, though they do not present themselves in so large a form, as to the period of time which has elapsed since, as they did in the last case. This is an appeal from a decree of the Court of Chancery in Ireland made upon an information; that information having been filed by the Attorney-General of Ireland to set aside a lease of lands belonging to a charity, upon the ground of improvidence and breach of trust, the lease having been granted for three lives with a covenant for perpetual renewal. The general question raised upon this information here and in the Court below was, whether such a lease is good, or void, or voidable? The precise question, strictly speaking, is, whether or not under the circumstances attending this case relating to a charity land, this lease is to be sustained or set aside by a Court of Equity?

I stated, at the conclusion of the argument, that it had a strange aspect to my mind, accustomed to the course of proceedings in English Courts, and accustomed to the manner in which lands are leased, whether by lease or by fines in this country, to find a charity lease sustained which was in fact

* See the note at the end of the case.

The principal arguments and authorities on both sides are noticed in the judgments at the end of the case.

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a perpetuity. I nevertheless then said that although this gave me an impression unfavourable to the judgment of the Court below.—it might be very possible for me upon examination to find it bot-tomed upon sound principle; for I then intimated that in Ireland, and in that part of Ireland in which these lands lay, this lease, at the time when it was granted, might be a provident and proper lease. This supposition or anticipation of mine has been amply confirmed by the examination which I have bestowed upon the circumstances of the case and of the charity, and I am prepared to move your Lord-ships to affirm the judgment, upon the grounds which I now proceed to state.

This was a lease granted in the year 1710, and the first point made, or attempted to be made, was to show that it was a letting at an undervalue. I am clearly of opinion that there is no foundation for this objection. I could not take upon myself in the year 1834, nor could the Court of Chancery in Ireland, in the year 1832 or 1833, undertake to say upon the facts in proof that the lands were undervalued at the time when they were leased. Upon that occasion a fine of 300*l.* was taken, and there was a rent reserved of 100*l.* a year, with stipulation for a fine of 25*l.* upon each subsequent renewal. Now at that time the interest of money in Ireland was eight per cent. Who then shall take upon himself to say that if he had been dealing with the property at that time he would have thought that he improvidently dealt with it by leasing it at an undervalue, if he took 300*l.* money bearing eight per cent. interest and reserving 100*l.* for the rent, and fines of 25*l.* upon each renewal? I am now prepared to say, on the contrary, that it appears to me to be an adequate value.

In the next place we come to the duration of the term, and I am not sure that it is law founded either upon principle, upon the statute, or upon authority, or that it is incumbent on a Court of Equity, to lay down the proposition that all leases such as this, that all perpetuities such as this, even that alienations, if a long term with a covenant for perpetual renewal amounts to an alienation in perpetuity, are necessarily void or voidable. There is no warrant of principle for holding such a doctrine. Each case must depend upon its peculiar circumstances. I could put a case where even an alienation might be fit, not merely justifiable, not only harmless as regards the trustees, not merely escaping the charge of a breach or abuse of trust, but that it might be a fit course for trustees to adopt. I can well conceive a case where they would not do their duty to the charity if they did not alienate a part of the land. Supposing, for instance, that there was a small piece of land, a corner of land, or an outlying estate, property of the charity, for which so large a sum might be had for the price of the sale as to put the charity in possession of a fund far exceeding the value. Suppose a thousand pounds offered for a piece of land convenient to some neighbouring lord of the soil, or to some manufactory about to be there established, that for half an acre of land that sum might be had, and yet the whole of the rents and profits of that land might never have exceeded one pound or even ten shillings a year, the *maximum* of rent which the charity could gain from it — Would it not be as gross folly in the trustees of a charity as in an individual not to accept the price and alienate the land: much more, in a similar case, might a perpetuity be

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laudably created, it being for the benefit of the charity?

In all these cases the quality of the transaction depends upon the circumstances; and the question in each case is, whether there has been a provident or an improvident management of the charitable fund? If the management has been such as I have described in the case which I have been putting, that is provident and justifiable: nay, I go further and assert that trustees would be guilty of an abuse of trust if, in such a case, they should hesitate to part with the lands, and that an information at the suit of his Majesty's Attorney-General, or of any relator, might, on principle, well be maintained against them to compel them to do that which is for the benefit of the charity.

That which I have stated to be the rule of provident and improvident management has the sanction of precedent. I refer to the *Attorney-General v. Cross* * where the Master of the Rolls held that there is no authority for saying that such cases are on the ground of time alone void as an abuse of trust. I refer also to what Lord Eldon said † with respect to the tenant of such lands, — that where a tenant gets at a low rent a charity lease this of itself, without other circumstances, is not enough to authorize the Court to turn him out because it is a charity estate. That *dictum* applies to this case, because you are not only asking him to make the lease void as in favour of the lessor but against the lessee, — you are taking the land from the lessee, although it has been held that the length of

* 3 Meriv. 524.

† In *Ex parte Skinner*, 2 Meriv. 453. See also *The Attorney-General v. Pembroke Hall*.

a lease granted by a charity to the tenant, if the tenant is guilty of no misconduct and if he has behaved with honesty, is no ground for rescinding the lease.* I refer to the case of the *Attorney-General v. Warren* in Swanston's Reports, a case accurately reported as all Mr. Swanston's cases are. It is there laid down by Sir Thomas Plumer, that the trustees are bound to exercise a prudent administration of the trust that there is no positive law or rule, of the Court which says that there shall be no long term or even that there shall be no alienation, if even alienation is for the benefit of the charity.

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It is urged in the argument for the Appellant that if the lease was not permitted by law the Court would never confirm it. If the trustees had no right to make the lease the Court could have no right or power to term it valid; that the Court might declare the validity of the original transaction, but could not give validity where it was illegal. Let us come then a little closer to the facts of the case; and let us, in the first place, observe whether or not it was a provident bargain at the time when it was made. In Ireland the course in these days was to let leases upon lives with covenants of perpetual renewal, in a word, to let leases such as this is renewable for ever on a fine received at the time of the renewal with a certain rent besides. It was said by the Lord Chancellor of Ireland, according to the notes of his argument in the Court below†, that the Duke of Ormond introduced this custom of leasing for the sake of obtain-

* 2 Swan. 291.

† See a note of this judgment in which the principal authorities are cited and discussed at the end of the case.

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ing more solvent tenants, better tenants therefore and, above all, Protestant tenants. It was the opinion held in those days by the Duke of Ormond, as it is held by many persons in these days, that there should be a preference given to Protestant tenants. His Grace did most prudently and successfully as it was then thought for the sake of encouraging solvent and Protestant tenants give them perpetuities. This was followed by others who agreed with the Duke of Ormond and, accordingly, it became the usual practice to grant such leases with perpetual renewals. Now, that being the case, what have we here but a lease according to the ordinary mode of management in that country at that time. It was held beneficial and, for ought I know, if I had been alive in those days I should have been induced to have done the same thing, and your Lordships have not the right to say, judging by the event, that such a lease is improvident or an abuse of the trust. Any man can tell me now that if he had been living at the time when this lease was granted, that is, about or soon after the time of the Duke of Ormond, he would have done otherwise with his own estate. The charity are bound to do what a prudent and provident landlord with his own estate would do, and I think a prudent and provident landlord, acting at the time in question, would have granted this lease. No trustee is bound to be a prophet. He is bound to act with providence and foresight to a reasonable extent, — but he is not bound to an absolute foreknowledge which no man can have of events that afterwards may occur. Although the event has proved that it would have been more provident not to have granted such a lease, we are

not to judge of the transaction by the state of things now, but as they were at the time. The very word provident, which has been used in the decisions referred to, shows, by its own proper force, that a trustee is to look forward, not to look forward indefinitely or with a prophetic eye, but to such events as a reasonable man, with common sagacity and prudence, might have in his contemplation and to adapt his conduct to existing facts: he is to look at the circumstances in which he lives, and he is to look at the result likely to happen from those facts and circumstances to regulate his conduct and guide his decision. The complaint of abuse must not be simply that he has not selected that mode by which the lease would be rendered most profitable. It may happen that the land might have been better and more beneficially disposed of, but a trustee is not bound to speculate upon future events, he is not even allowed to do so; he is to act upon common probabilities, according to circumstances existing at the time when he lives, judging of that which is likely to happen hereafter from what he sees at present; and it would be wrong to say that he was either compellable or even at liberty to speculate as to remote contingencies beyond the view of ordinary knowledge and judgment. Events have happened to alter the value of lands, but who was to know that they would happen? Consequences have taken place unfavourable to the charity, but who could tell that such would be the result of the course which has been adopted? One hundred and twenty years after the date in question we, enlightened by those events, and having the advantage of the knowledge of those events which was hidden from the trus-

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tees, can easily decide the question which would have set at nought the experience and judgment of the wisest and most foresighted individuals then living.

For these reasons I am of opinion that, regard being had to the facts and to the circumstances of the times, and the usual practice of landlords in dealing with large estates at that time and in that country, that this was not such an improvident lease; that, even in the case of charity property, your Lordships can be satisfied an abuse of trust has taken place.

Then with regard to the time to which I said I should address myself of one hundred and twenty years, during which nothing has been done; fifty-two years having elapsed since the last renewal, would it not be monstrous to call upon the landlord to turn out the tenant after 300*l.* has been paid for the fine, after 100*l.* *per annum* has been paid for the rent, after the consideration has been paid upon the renewal, upon the faith of the bargain standing firm, and all paid upon the faith of a contract between the tenant and the trustees of the charity? A valid lease perpetually renewable it has been truly and repeatedly said is no bar, and, among other cases to that effect, *The Attorney-General v. Warren* is cited; but then if no bar by the statute of limitations it is, at all events, a circumstance of equity, which produces a very powerful obstacle not easily to be got over in the way of any Court of Judicature which may be required to set aside what has stood so long, and may have been made the subject of many arrangements. Would it not be a just ground of complaint? Might not the tenant well say, My ancestor did not mean to give 300*l.* in

those days for a lease not renewable for ever — he did not mean to give 100*l.* a year upon a loosing bargain for the first ten or twelve years, but he thought he should recompence himself upon a longer term, and in contemplation of that benefit he paid the premium, the rent, and the fine upon the renewal.

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Upon the whole, therefore, I am clearly of opinion in this case that the Court of Chancery in Ireland has come to a sound decision, and, therefore, I have great satisfaction in moving your Lordships that this decree should be affirmed, but for the reasons which induced the Court below not to give costs I move your Lordships that the costs should not be given here, although I do not advise your Lordships to pay the costs out of the charity estate.

Judgment affirmed.

Note. — The Judgment of *The Lord Chancellor* of Ireland (Plunket), in the Court below, was as follows, after stating the facts of the case : —

An attempt has been made to impeach this lease on the ground of under value, but I do not see there is any foundation for that. A fine of 300*l.* was given, 100*l.* was reserved as the annual rent, and a renewal fine of 25*l.* This was done in 1710, at which time the rate of interest in this country was 8 per cent. It appears to me that there is nothing so dangerous, as after such a lapse of time to go into the question of fair value; 300*l.* fine and 100*l.* rent were large sums in those days. But it is contended on the part of the Relators, as a proof of under value, that those lands now produce annually 330*l.* It is not possible for this Court to say that, because lands now produce 330*l.* a year, they could not have been demised in 1710 at a fair rent of 100*l.* It appears from the evidence that those lands had been previously demised at the same rent to Sir J. Meade; that does not show any under value, and there is no reason to presume it to have been so. I

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must, therefore, assume that there is no under value in this demise.

It remains then to the Relators to impeach the lease on the principles of the law of this Court; and their counsel have contended, that this being a lease of lands belonging to a charity, granted for lives, renewable for ever, is a perpetuity, and amounts to a disappointment of the objects of the founder, and is therefore liable to be set aside. The Defendant's counsel contended that there is no such principle in equity, but that each case must depend on its own peculiar circumstances. It is further contended, that it is not necessarily a violation of the trust to make such a lease, and that if it were, it would not avoid the lease in this case made by the trustees, as it must appear on the face of the lease that it has been made contrary to the principles of this court respecting charity. The Relator's counsel relied on the case of the *Attorney-General v. Green**, decided by Lord Eldon, in 1801. The trustees in that case demised a charity estate for 999 years, in consideration of an additional rent of 4*l.*, and a sum of 500*l.* at the least to be laid out in repairs. Lord Eldon set the lease aside, but did not lay down any principle that such a lease was necessarily void. His Lordship said, "It is impossible that a person taking in good faith would take such a lease as that." That does not establish the principle, that a long lease of a charity estate is necessarily void. The *Attorney-General v. Moses*† was then referred to, on account of a *dictum* of Sir T. Plumer, M.R., "That long leases of charity estates are by a series of decisions determined to be bad." It is a loose expression, and could not be intended to express the principle contended for here by the counsel of the Relators. In the next sentence Sir T. Plumer adds, "In these cases the Court has considered whether there has been a prudent and provident execution of the trust." This shews that the learned Judge did not intend to go the length here contended for; he refers to several authorities, first, the *Attorney-General v. Green*, which I have already stated; next the *Attorney-General v. Owen*‡; that was a lease for a term of ninety-nine years in a charity estate, at a rent of 3*l.* Lord Eldon set it aside, as there was no proof of a consideration shewing that it was fair and reasonable and for the benefit of the charity; but his Lordship expressly stated that he would not lay down any precise rule, but

* 6 Ves. 452. 2 B. C. C. 492.

† 2 Mad. 294.

‡ 10 Ves. 553.

he was of opinion that a mere husbandry lease of ninety-nine years, without consideration, the Court would not permit to stand. This shews that in his opinion it was open to the parties to shew there was a consideration, and also any circumstance favourable to sustain the lease. In the *Attorney-General v. Backhouse* *, a lease for a charity estate for eighty years was supported as to the interest of the sub-lessee, upon a fair consideration given several years before, and no notice, except that it was a lease of a charity estate. Lord Eldon says, "These parties must be understood at least to have notice that the lessors were trustees for a charity, but I cannot go the length of holding that the purchaser had notice that it was a bad lease, that depending upon a number of circumstances, *dehors* the lease." A reference was made to the Master, to inquire if the lease had been made on unreasonable terms; and it was added, "if the lease had been made on unreasonable terms, it must depend on the degree, as it must be in such a degree that the Court may infer that it was fraudulent." In the *Attorney-General v. Wilson* †, leases of charity estates for twenty-one years, the lessors not being mere trustees, but having also a beneficial interest, was set aside, as breaches of trust, by reason of under value. In the *Attorney-General v. Hotham* ‡, it is decided that a husbandry lease of lands belonging to a charity, at an unfair rent, cannot stand, unless some satisfactory reason can be given to support it. In *Ex parte Skinner* §, Lord Eldon says, he desires it may not be considered to be his opinion that a tenant who has got a charity lease at too low a rent, with reference to the actual value, is therefore to be turned out, if it appears that he has himself acted fairly and honestly. In the *Attorney-General v. Cross* ||, the Master of the Rolls says the leases were impeached on two grounds; first, as being of an improper length; secondly, as having been made for an inadequate consideration. His Honor proceeds, "I am not aware of any principle or authority on which it can be held that such a lease is on the face of it an absolute abuse of trust; supposing, however, that where charity estates had been usually let for twenty-one years, it would be considered improper to substitute a letting for lives, it does not follow that we can impute abuse to a mere adherence to the ancient uniform mode of letting, especially when it is a mode usual in the district in which the estates are situated."

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* 17 Ves. 288.

† 18 Ves. 518.

‡ 1 Turner, 209.

§ 2 Mer. 453.

|| 3 Mer. 524.

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His Honor then adverts to the *Attorney-General v. Price* *, where Lord Hardwicke says, "As to letting the estates for the future, one consideration is whether I shall let for the improved rent or direct fines to be taken." He then goes on to declare, that he will leave it to the Master to inquire "whether letting on an improved rent, or leasing on fines, be for the benefit of the charity, since a great deal depends on the custom of the country." I must here remark, that the lease in the present case was not an ordinary charity lease, for here the charity estates were put under the control of governors residing on the spot. The Master of the Rolls goes on to state, "In order to set aside such a lease, already existing, it is not enough to say that the mode of letting is not the best that might be prescribed, because on such a point there may be a difference of opinion amongst the most experienced, but you must shew that the mode is so positively bad, that no persons meaning fairly to discharge their trust would have resorted to it;" he then adds, "many landlords do still let their estates upon leases for lives, and formerly the general usage in Devonshire was to let in that manner." The Master of the Rolls then adverts to the ground of under value, and says, "it must be an under value, satisfactorily proved and considerable in amount. It is not enough to shew that a little more might have been got for the estate than has been actually received, still less is it sufficient to infer the underletting from the value of property at some subsequent period." That is a very important decision, for it establishes this principle, that in impeaching charity leases, it is not sufficient to shew that an improvident use was made of the trust, but it must be an express abuse of it, and not sanctioned by the custom of the country. The *Attorney-General v. Warren* † was decided by Sir T. Plumer. I refer to it on account of the importance of the observations made on the subject of leases for long terms of years, granted by trustees of charity estates. He says, "The principle that governs all the cases is this, That the trustees are bound to a provident administration of the fund for the benefit of the charity; there is no positive law, which says that in no instance there shall be an absolute alienation; if so, even in the case of an inquiry under an order of the Court, whether alienation would be beneficial to the charity, being contrary to law, it would not be good;

* 3 Atk. 110.

† 2 Swanst. 291.

"but on many occasions, by the authority of the Court alienation has taken place, as in the case mentioned of a decayed house, in which, after a reference to the Master, to inquire whether it was for the benefit of the charity the Court directed it to be disposed of. If, contrary to law, the Court could not authorize the disposition, alienation under the authority of the Court would be as invalid as without it. These decisions, therefore, afford a conclusive proof that alienation, not improvident, but beneficial to the charity, and conformable to the rule which ought to guide the trustees, may be good, and disclose the principle on which any bill to rescind that alienation must proceed."

These are the authorities material to shew the law on the subject of long leases granted of charity estates. They clearly establish that even an alienation is not invalid. The first question is, Was it an improvident act, or was it so improvident that no prudent person under such circumstances would accept of such a lease?

Let us apply the law as so laid down to the facts of the present case. In 1710 the lease was made for three lives, with a covenant for perpetual renewal. In the ears of an Englishman such a lease would sound as a total alienation. I must, however, refer the granting such a lease to the then existing state of this country, although there is no evidence before me on that subject. It was the usual custom at that period so to demise land; it was considered beneficial to the landlord, in order to secure solvent tenants. It had been introduced into this country about the time of the Revolution, by the Duke of Ormond, and was the custom of the country where his estates were situated. At that period it was a great object to the owners of estates to get Protestant tenants, who would bind themselves and their descendants to the payment of adequate rents. From one of the authorities I referred to, it appears it was the usage in Devonshire to grant leases for lives; so in Ireland a lease of this description is looked upon as a usual husbandry lease, and the estate belonging to a charity does not make any exception. This lease was made in 1710, of a part of the charity estate; another lease was soon after made of another part upon a similar term. Here are trustees acting under governors residing on the spot; if the trustees had consulted those governors, they must have stated to them that there was no house for the purposes of the charity, neither did there exist any funds to enable them to build; was it not the duty of the trustees to suggest the expediency of getting 300*l*.

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to enable them to erect buildings necessary for the establishment? Surely the governors must have acceded to such a suggestion; it was for the benefit of society at large that this should be done as soon as possible, in order to educate and tranquillize the country — it was expedient it should be done speedily.

The case now before me for decision resolves itself into this plain question, Was it an improvident administration of the estate of this charity, thus to demise the lands and receive a fine? Or was it their duty to have waited until a sum sufficient for that purpose had been accumulated out of the rents and profits? I should say that it was not their duty to have waited for such accumulation; and in my opinion they were authorized by the nature of the charity to resort to the mode they adopted, to raise a fund to enable them to erect the buildings. This is not on the face of it such a gross abuse of the trust, that no persons intending to discharge their duty fairly would have resorted to it.

There was a renewal of this lease in 1782. The lessee and those representing him have been in possession of the lands, under this lease, 120 years. I am bound to protect charities; but I am not to introduce uncertainty in the rights of parties after such a lapse of time. I cannot grant relief. I do not rely on time as creating a bar to relief; but I treat it as evidence, that the rent reserved was the fair value, and that the trustees exercised a sound discretion in thus demising for three lives, with a covenant for perpetual renewal, in consideration of a fine.

I must, therefore, dismiss this information, but without costs.

See the *Attorney-General v. Morgan*, 2 Russ. 306. *Attorney-General v. Pembroke Hall*, 2 Sim. & Stu. 441. *Attorney-General v. Lord Hotham*, 1 Turn. & R. 209. *Attorney-General v. Wray*, Jac. 307. Ex parte *Berkhampstead Free School*, 2 V. & B. 138. *Attorney-General v. Wilson*, 18 Ves. 518. *Attorney-General v. Maywood*, Id. 315.

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ENGLAND.

(COURT OF CHANCERY.)

CHARLES CANDY - - - - *Appellant;*

Sir ROBERT CAMPBELL, Bart. and }
DANIEL STUART, Esq. - - - } *Respondents.*

J. H. by his will gave to C. H. his adopted daughter 20,000*l.* 3 per cent. consols, and his house and landed property at C. and M. The will then proceeded in the following terms: But in case of her death *without lawful issue*, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be *living at the time*; and the land, &c. at C. to my nephew, the Rev. J. H.; and that at M. to my nephew, Lieutenant J. H., &c. I request R. C. and D. S. to be her guardians, and allow whatever they please for her education annually, and after she has left school; and if she marries, it must be with their consent, and the property to be solely *settled upon herself and children*, and in no way *changed or alienated*.

Held, that under this limitation the 20,000*l.* consols vested absolutely in C. H.

JOHN HARDING, late of Culworth, in the county of Northampton, Esq., deceased, on the 3d day of January, 1826, made and published his last will and testament, in writing, duly executed in the following terms:—

“I John Harding of Culworth, do make this
“my last will and testament. I give and bequeath
“as follows: To my adopted daughter, commonly
“called Caroline Harding, the sum of 20,000*l.*

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“ three per cent. consols, and my house and
“ landed property at Culworth, also that at
“ Morton Pinkey; but in case of her death *with-*
“ *out lawful issue*, I then will the money so left to
“ her to be equally divided betwixt my nephews
“ and nieces, who may be *living at the time*, and the
“ land, &c. at Culworth to my nephew the Rev.
“ James Harding, and that at Morton Pinkey to
“ my nephew Lieutenant John Harding, Madras
“ establishment; and I request my much esteemed
“ friends Robert Campbell, No. 5. Argyll Place,
“ and Daniel Stuart, Esqs., to be her guardians,
“ and allow whatever they please for her educa-
“ tion annually, and after she has left school; and
“ if she marries it must be with their consent; and
“ the property to be solely settled upon herself
“ and children, and in no way changed or alienated;
“ and as a token of my esteem for them, I give
“ and bequeath to each of them the sum of 400*l*.
“ I leave to each niece and nephew of mine the
“ sum of 1000*l*., and to Charlotte Ann Harding
“ my niece, daughter of my late brother Francis,
“ the sum of 3000*l*.; but in case of her death *with-*
“ *out issue*, this 3000*l*. to revert back and to be
“ divided betwixt my nephews and nieces who
“ may then be living. I give to Elizabeth Gascoine
“ my servant fifty-two guineas per annum, that is
“ to say, one guinea per week for the term of her
“ natural life, free from all deduction, and in addi-
“ tion, the sum of 100*l*. as arrears of wages, and a
“ suit of mourning; and to my servant Edward
“ Watson 50*l*. and mourning. I bequeath towards
“ the Northampton Lunatic Asylum to be erected
“ the sum of 100*l*. I request my brother to have

"mourning rings made to give to relatives and
 "friends whom he pleases. I give and bequeath
 "100*l*. to the grandchildren of my uncle John
 "Harding, total 300*l*. One each, as a token of
 "esteem to my cousins. William Harding 50*l*. to
 "his brother James 50*l*., and James Perrior 50*l*.
 "What property I may die possessed of not other-
 "wise appropriated, I divide into fifteen shares,
 "seven of which to be for my brother William,
 "and after him to his seven children; five for my
 "sister Candy, and after her to her five children,
 "and the remaining three to my sister Wright, and
 "her children afterwards. I permit my sister to
 "live at Culworth, where she is, for the term of
 "her natural life, if she pleases, in common with
 "my natural daughter commonly called Caroline
 "Harding; for in her it is to be understood the
 "household furniture, wines, and books are vested,
 "only selling such property as may not be re-
 "quired for use: this child Caroline will not leave
 "school for good for some years, therefore Mrs.
 "Candy will pay for all she wants, except rent
 "for land, &c.; and she may permit Charlotte Ann
 "Harding my niece to live with her, they making
 "use of the plate, and every thing in the house.
 "With respect to trinkets, the diamond ring to
 "my adopted daughter Caroline; the diamond
 "broach, my brother William; diamond pin, my
 "sister Candy; gold watch, nephew William
 "Harding; and chain and Persian seals to John;
 "as well as my china card box, with counters
 "marked J. H.; large escrutoir to Henry my
 "nephew; a Surat card box to be kept at Cul-
 "worth; a small escrutoir to Charlotte Ann.

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“Harding; shawls, two neck ones, small ones, to
 “my adopted daughter Caroline, others to be dis-
 “tributed as they please. Bed, bedsteads, to my
 “servant Elizabeth for her own use, tubs, &c. in
 “London. Two chairs made at Surat, I should
 “like to be kept by my family. In witness
 “whereof I have this third day of January set my
 “hand and seal, 1826, appointing my brother
 “William, sister Ann Candy, and the Rev. James
 “Harding my nephew, in common with Robert
 “Campbell and Daniel Stuart, Esqs., my executors
 “in this country; and my nephews Lieutenants
 “George and Thomas Candy in Bombay, my exe-
 “cutors in India. J. Harding. (L. s.)

The testator died on the 10th of January, 1826,
 without issue, and left surviving him the said Caro-
 line Harding, the Reverend William Harding, his
 brother and heir at law, and seven children of the
 said William Harding, namely, the Reverend James
 Weston Harding, called in the will the Reverend
 James Harding, Elizabeth, the wife of the Reverend
 Hugh Maltby Spence, Mary the wife of the Ap-
 pellant, Charles Candy, John Ward Harding, Wil-
 liam Harding the younger, Henry Harding and
 Harriet Harding; also his the testator's sister, the
 said Ann Candy, widow, and five children of the
 said Ann Candy, namely, Francis Candy the Ap-
 pellant, Charles Candy, George Candy, Thomas
 Candy, and Henry Candy; also his sister Charlotte
 Wright, the wife of William Wright, and three
 children of the said William Wright and Charlotte
 his wife, namely, Harriet Wright, Charlotte Wright
 the younger, and William Harding Wright; and

also Charlotte Ann Harding, the only child of the testator's brother, Francis Harding, deceased.

Soon after the testator's decease, his will was proved in the Prerogative Court of Canterbury by four of the executors, namely, the Reverend William Harding, the Reverend James Weston Harding, and the Respondents Sir Robert Campbell, Baronet, then Robert Campbell, and Daniel Stuart.

In Hilary term, 1826, the Respondents and Caroline Harding exhibited their bill in the Court of Chancery against the Reverend William Harding, the Reverend James Weston Harding, the Reverend Hugh Maltby Spence and Elizabeth his wife, Ann Candy, widow, the Appellant, Charles Candy, and Mary his wife, William Wright and Charlotte his wife, and the other nephews and nieces of the testator above named, insisting, among other things, that the Plaintiff, Caroline Harding, was entitled to an absolute interest in the legacy of 20,000*l.* three per cent. consolidated annuities, and that the bequest over of the same in case of her death without lawful issue was void; and praying, among other things, that an account might be taken of the testator's personal estate, and of his funeral expenses, debts, and legacies, and that his personal estate might be applied in payment thereof, and that the said legacy of 20,000*l.* three per cent. consolidated annuities might be secured for the benefit of the Plaintiff, Caroline Harding, and that she might be declared to be absolutely entitled thereto, and that guardians of the Plaintiff, Caroline Harding, might be appointed, and an allowance made for her maintenance and education during her minority.

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All proper parties having appeared and put in their answers to the bill, the cause came on to be heard, before the Master of the Rolls, on the 21st of December, 1826, when a decree was made, directing, among other things, the usual accounts to be taken as prayed by the bill, and referring it to one of the Masters of the Court to approve of proper persons to be guardians of the Plaintiff, Caroline Harding, to state the amount of her fortune, and to inquire what would be a proper allowance for her maintenance and education, as to which the Master was to be at liberty to make a separate report.

The Master, by his separate report dated the 2d of April, 1827 (which was afterwards confirmed), certified, among other things, that the Plaintiff, Caroline Harding, was entitled, under the will, to an absolute interest in the sum of 20,000*l.* three per cent. consolidated annuities, subject to such direction for a settlement as in the will mentioned.

Three of the Defendants, namely, Elizabeth Spence, the Reverend William Harding, and Henry Candy, having died, a bill of revivor and supplement was filed by the Respondents and the Plaintiff, Caroline Harding, for the purpose of reviving and carrying on the suit and proceedings against the personal representatives of the deceased parties; and the Defendants to the bill of revivor and supplement having appeared to and answered the same, a decree was made in the supplemental suit, dated the 21st of May, 1828, whereby it was declared, that the said Plaintiffs were entitled to have the benefit of the several proceedings had in the original cause against Ann Candy, the

administratrix, with the will annexed of the said Henry Candy, deceased; and it was ordered, that the former decree of the 21st of December, 1826, and the accounts and inquiries thereby directed, and the several proceedings had therein, should be carried on and prosecuted between the parties to that supplemental suit, in like manner as had been directed as to the parties to the original suit.

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The Master having made his general report, and the causes having come on to be heard before his Honour the Vice-Chancellor for further directions on the Master's report, and as to the matter of costs, a decree was made therein, bearing date the 29th of July, 1829, whereby sundry directions were given; and it was among other things declared, that the Plaintiff, Caroline Harding, under and by virtue of the will of John Harding, the testator, was entitled absolutely to the sum of 20,000*l.* Bank three per cent. annuities bequeathed to her by the testator's will.

In the month of December, 1829, some of the Defendants in the causes, including the Appellant, Charles Candy, and Mary his wife, and Francis Candy and Charlotte Ann Harding, being dissatisfied with so much of the last-mentioned decree as declared that the Plaintiff, Caroline Harding, was, under the will of the testator, absolutely entitled to the legacy of 20,000*l.*, three per cent. consolidated annuities, and also with another declaration contained in the decree, presented a petition of rehearing and appeal to the Lord Chancellor, complaining of those parts of the last-mentioned decree as erroneous, and appealing to his Lordship therefrom.

On the 10th of October, 1830, the Plaintiff,

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Caroline Harding, died unmarried and without issue, having made and published her will, bearing date the 13th of May, 1830, whereby she appointed the Respondents executors thereof; and the Respondents after her death obtained probate of her will to be granted to them by the Prerogative Court of Canterbury, and became her legal personal representatives.

After presenting the petition of appeal to the Lord Chancellor, the Defendant, Charlotte Ann Harding, intermarried with John Pulman, and the Defendants, Harriet Wright and Francis Candy, having died, by means whereof and of the death of Caroline Harding the suits became abated, the Respondents, in Easter Term, 1831, filed their bill of revivor against John Pulman and Charlotte Ann his wife, the several other surviving Defendants in the original and supplemental causes, and the respective personal representatives of Harriet Wright, deceased, and Francis Candy, deceased, and the suits and proceedings were duly revived by an order dated the 5th of May, 1831.

The petition of rehearing and appeal came on to be heard before the Lord Chancellor, on the 26th of July, 1831, when his Lordship dismissed the appeal, and affirmed the decree of the 29th of July, 1829.*

The Defendant, Charles Candy, appealed from such part of the decree of the 29th of July, 1829, as declares, that the Plaintiff, Caroline Harding, is, under the will of the testator, absolutely entitled to the sum or legacy of 20,000*l.* three per cent. Bank annuities.

* See *Campbell v. Harding*, 2 Russ. & M. 290.

For the Appellant, *Mr. Twiss and Mr. Hodgkin.*

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At the time of pronouncing the decree, Caroline Harding was living and unmarried ; to decree her to be absolutely entitled to this sum of 20,000*l.* three per cent. consols was therefore, in effect, to expunge from the will these important words : "*If she marries, it must be with their consent, and the property solely settled upon herself and children, and in no way changed or alienated.*" In other words, to hold that a gift in strict settlement, and a gift to her absolutely, which she might squander the moment she attained twenty-one, are identical.

There is no authority for the doctrine, that in construing a bequest the Court is to be restricted by what have been termed the four corners of the clause, but, on the contrary, every case shows that in quest of a testator's intention, and especially in the twilight of an ill drawn and unprofessional instrument, you are to seek and derive light from every part of that instrument. The four corners of the instrument are the only legal, as certainly they are the only rational, limits of investigation. That was the doctrine of Lord Chief Justice Wilmot, in a case * in this House, which, whatever may be thought of the reliance which was placed upon minute circumstances, contains a store of sound legal principle, and vigorous reasoning. "ALL THE WORDS AND PASSAGES IN THE WILL" are the expressions which he there uses, and which the House combined in order to ascertain the testator's meaning. In *Gittins v. Steele* †, "We have now

* *Keiley v. Fowler*, 3 Bro. P. C. 299.

† 1 Swan. 28.

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"reached," says Lord Eldon "the sound rule, that  
 "for the purpose of collecting the intention every  
 "part of the will must be considered. That rule  
 "was first established by the great judge whom  
 "we have just lost, the late Master of the Rolls,  
 "and was confirmed by myself in *Bootle v.*  
 "*Blundell*."

It is perfectly immaterial in what order the clauses are found in an instrument, or, in other words, that the connection of the subjects and the order of the events are more to be regarded than the position of the syllables. Thus, in *Cro. Eliz.* p. 9., *Anonymous*, Anderson C. J. said, "That if  
 "one devise land to J. S. in fee, and after by the  
 "same will devise that land to J. D. for life, both  
 "parts of the will shall stand, and in construction  
 "of law, the devise to J. D. shall be first." In *Ridout v. Dowding*\*, Lord Hardwicke says, "It  
 "is immaterial how a testator places the several  
 "devises in a will, because the whole must be  
 "construed together." In *Doe against Martin*†, Lord Kenyon says, "Whether the limitations pre-  
 "cede or follow the power of appointment, it  
 "makes no difference." In *Blamire v. Geldart*‡, Sir William Grant (no latitudinarian) says, "In a  
 "will it is not material in what order the clauses  
 "are arranged. The question is, What is the  
 "effect upon the whole? This testator begins by  
 "giving to George Pringle the stock at the death  
 "of his wife; and then gives to his wife the whole  
 "of the property: consequently she has a life in-  
 "terest in that stock, so given to George Pringle  
 "at her death. Thus the will, no matter in what  
 "order, divides the fund between these two per-

\* 1 Atk. 419.

† 4 T. R. 65.

‡ 16 V. J. 316.



“ sons, giving to one the interest for her life, and  
 “ to the other the capital at her decease.”

To apply these principles to the case before us, the whole of the limitations to Caroline Harding and her issue, with the gift over, arranged in the order which the connection of the subject requires in the chronological, and therefore as we have seen in the legal, order will stand thus: “ I give  
 “ and bequeath to my adopted daughter, commonly  
 “ called Caroline Harding, the sum of 20,000*l.*  
 “ three per cent. consols; and if she marries, the  
 “ property to be solely settled upon herself and  
 “ children, and in no way changed or alienated;  
 “ but in case of her death without lawful issue, I  
 “ then will the money so left to her to be equally  
 “ divided betwixt my nephews and nieces who  
 “ may be living at the time.” The simple question for your decision is, What is the meaning of the words *death without lawful issue*? Do they mean, first, an indefinite failure of issue, or, secondly, death without leaving issue at the time of her death, or, thirdly, failing the gift to the issue as purchasers? It is by no means an uncommon error in the statement of the law upon this subject to represent an indefinite failure of issue as the general, I had almost said universal, rule, and every other construction as an exception out of that rule; now it may be admitted, that where there is a gift to the ancestor only, followed by a limitation over on his or her death without issue, or in default of his or her issue, or without his or her having any issue, or words to that effect, such is the general rule, and that whoever seeks to confine the expressions to a death without issue living at the death of the ancestor, or at any other particular point of time,

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or to a death without ever having had any issue, is bound to make out his case with strictness and clearness; but the case is totally different where, in a devise or bequest, there are limitations capable of conferring the fee in realty, or an absolute interest in personalty upon the children, or issue themselves as purchasers, an undeviating train of authorities, embracing not only personal but also real estate, prove to demonstration that with limitations so circumstanced the rule has nothing to do.

In the decision below the question was treated as if it were simply whether death without issue meant an indefinite failure of issue, or a failure of issue *living at the death of Caroline Harding*. Cases on real estate are authorities *à multo fortiori* for personal estate; for though there are many cases where a limitation which in real estate would be held to refer to an indefinite failure of issue has been held in personalty to refer to a restricted or limited failure, there is no case in which a limitation which in personal estate would be held to refer to an indefinite failure of issue has been held in realty to refer to a restricted or limited failure. The first case was *Loddington v. Kyme*\*, which ranged the various courts from the fifth to the ninth Will. & May, and was eventually decided by this House. The case involved a variety of points. It was a case on real estate. "Sir Michael Armin devises land to Evers Armin for life, and in case he have any issue male, then to such issue male and his heirs for ever; and if he die without issue male, then to

\* 1 Salk. 224. 3 Lev. 431.

“Bernardiston and his heirs for ever.” In Levinz it is said, “The last words, ‘And if Evers Armin die without issue,’ are not to be taken substantively and absolutely, but relatively to what he had said before; and it cannot be intended that he by those oblique words would destroy by implication the estate expressly devised before to the issue male of Evers and his heirs.” This may be considered the normal case of the class: it has nothing to do with ulterior limitations after a failure of issue; but with alternative limitations, if there are no issue who can take. In this class of concurrent limitations, whether in real or personal estate, is a vested limitation to the ancestor, with two branches beyond it; if there are any issue to them absolutely. If there are none, then and then only the alternative branch takes effect.

In the case of *Salkeld v. Vernon*\*, James Smith bequeathed to Sarah Ruffe’s child or children, to the number of four, the sum of 1000*l.* each; and if she should have a greater number than four living at his decease, then he gave, devised, and bequeathed the sum of 4000*l.* only to be divided amongst the said children that should be so living at his decease, share and share alike, to be paid them when they should attain their respective ages of twenty-one years, with accruer as therein is mentioned. But if the said daughter should happen to die without issue, then and in such case he gave, devised, and bequeathed the said sum of 4000*l.* to Mary Barker, James and Elizabeth Barker, and the survivor of them. Lord Northington determined in favour of the validity of the gift over: he says, “On these

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“ words it is said the limitation over, after a general failure of issue, is too remote and void. “ And it is true, that whenever a particular estate “ is given in a chattel of the duration of an estate “ tail a limitation over is void by way of remainder, “ but an absolute legacy to the children, if they “ live to its vesting in them ; and if they do not, “ then to other persons : it is like the limitations of “ two fees-simple, to start at the same time upon “ different events, as in the case of *Loddington v. Kyme*.” This reference to the case of *Loddington v. Kyme* shews that he went upon the distinction between alternate and successive limitations, which is the very hinge of this class of cases.

The case of *Target v. Gaint*\*, although it is generally cited as an authority for the construction which confines the words *die without issue* to a failure of issue at the time of the death of the *propositus*, belongs more properly to the class in which the words *die without issue* are treated as equivalent to “ failing the objects of the antecedent limitations.”

The bequest in that case was as follows : To my son Henry for his life, and no longer, and after his decease to such of the issue of the said Henry as Henry by his will should appoint ; and in case Henry should die without issue, then to his brother Albinus for the residue of the term. Lord Chancellor Macclesfield held, that the devise over of the term to Albinus was good ; and the reporter adds, that the Lord Chancellor cited the case of *Loddington v. Kyme*, and said that this was a stronger case than the principal. This reference to *Lod-*

\* 1 P. Wms. 432. Gilb. Eq. R. 149. 10 Mod. 402.

*dington* and *Kyme* shews, that the distinction between alternative and successive limitations was the ground of the decision.

In *Goodright v. Durham* \*, there was a devise to J. L. for life, and after his death to all his children equally and their heirs; and in case J. L. should *die without issue*, to the testator's two daughters and their heirs, Lord Mansfield held it to be clear that the limitation over was the same thing as in case he died without children. In *Doe v. Lyde* †, S. Lyde by his will bequeathed certain leasehold premises to his son George Lyde for life, and after his decease to Margaret his wife for life, and after the decease of the survivor to the children of George, share and share alike; but if George should die without issue of his body, then over. In this case the decision was in favour of the gift over; and one of the learned judges by whom it was decided observed, "In my opinion nothing is so clear as that if that had been a devise of a freehold it would not have given an estate tail;" and again "the testator has given to the children the interest of these premises, share and share alike, that is, for ever; so that the contingency, upon which the limitation over is founded, could only be in case there were no children." In effect the bequest was to George for life, remainder to his wife for life; and then if George had any children to them absolutely, if he had none, to other persons: the dispositions were alternative, not successive, and therefore all objection derived from the supposed remoteness of the latter limitation wanted its very foundation. In *Hockley v. Mawbey* ‡ the

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\* Dougl. 264.

† 1 T. R. 593.

‡ 1 Ves. J. 143. 3 B. C. C. 82.

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devise and bequest was by John Russell to his son Richard Russell and his issue lawfully begotten or to be begotten, to be divided among them as he should think fit, and in case he should *die without issue*, over. Lord Chancellor Thurlow, in delivering judgment in this case, says, "It is clear to me, that the testator intended, and, I think, has pretty plainly expressed, a contingency with a double aspect; in one case to the children of the son; in the other, to the other persons pointed out: to the children of the son in one way; to the other parties in another." And again he adds, "It is an estate devised upon two alternative contingencies; one, that there were objects capable of taking under the first limitation; another, that there were none such, but that there were objects capable of taking under the second."

In *Vandergucht v. Blake* \* Martha Liney bequeathed long annuities to trustees in trust for George, Elizabeth, and Martha Liney for their lives; and in case of the death of either of them, leaving any child or children, then the annuity of him or her so dying should be equally divided between such child or children; and in case of the death of either of them (George, Elizabeth, and Martha) *without issue*, then the annuity of him or her so dying should go to the survivor or survivors of them. Lord Alvanley held the gift over good. The cases also of *Blackburn v. Edgley* †, *Ginger v. White* ‡, and the late case of *Morse v. Lord Ormond* §, all distinctly shew that where there are antecedent limitations, to which the words "die with without issue" can be referred, they mean simply, *failing*

\* 2 Ves. J. 534.

† 1 Russ. 382.

‡ 1 P. Wms. 600.

§ Willes, 348.

*the antecedent limitations*, they do not belong to that clear and determinate class of cases to which the Appellants' case belongs, *viz.* of two alternative dispositions, each of which carries the fee; the gifts in those three cases being to the issue, and only for limited estates. The case of the *King v. the Marquis of Stafford*\* proceeded on the same principle. It is true that the words of the gift over were, "*in default of SUCH issue*;" but, as Lord Ellenborough in deciding it said, this was a distinction without a difference; for the one expression as well as the other might, under the same circumstances, mean an indefinite failure of issue; and as he fully recognised the general doctrine of *Goodright v. Durham*, the case establishes the proposition, that wherever there is a gift of personal or even of real estate to an individual, followed by limitations capable of conferring the absolute interest on all the children or issue as purchasers, a limitation over in default of issue, is an alternative limitation in the event of the gift to the children or issue not taking effect. The case of *Malcolm v. Taylor*† is a full recognition of the principle for which we contend. The circumstances of that case differ in some respects from those of the present, but the principle was the same. In *Malcolm v. Taylor*, the testatrix bequeathed the Lysons plantation and her money in the funds, unto and to the use of Elizabeth Goodin Taylor, and Maria Taylor, and their respective assigns, for the terms of their natural lives, share and share alike; and after the death of either of them, then unto the survivor of them and her assigns for her life; and

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\* 7 East, 521.

† 2 Russ. &amp; M. 416.

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event, and by the very same clause as the personal), the ulterior limitation is for life only; and *Roe v. Jeffrey* \* is a clear authority that where this is the case, the dying without issue must be confined to a dying without issue at the time of the death of the first taker.

In that case as in ours there was no express limitation for life: it was only as in our case, the absence of words of limitation which made the ulterior estates life estates; and by making those estates life estates, confined the death without issue to a death without issue living at the death.

So upon a gift to a denizen or bastard, and his heirs a limitation over is good; because he can have no heirs but of his body. †

It has been supposed, that the authority of *Roe v. Jeffrey* is shaken by the case of *Barlow v. Salter*. ‡ But *Roe v. Jeffrey* obtained the marked approbation of the Lord Chancellor in the present case, and it is not opposed by *Barlow v. Salter*, there is not in fact any discrepance whatever. Lord Kenyon in *Roe v. Jeffrey* decided, that a limitation over of life estates only had the effect of confining a death without issue to a death without issue living at the death: because it necessarily shewed that the failure must be on a proximate event. Sir William Grant in *Barlow v. Salter*, decided that a limitation over of the whole fee (though divided into life estates and remainders over) had no such effect.

This is perfectly consistent. "Assuredly" he says, "where nothing but a life interest is given over, the failure of issue must necessarily be intended

\* 7 T. R. 589.

† 1 Roll. Rep. 436. 1 Bac. 786.

‡ 17 Ves. 479.



"a failure within the compass of this life; but when the entire interest is given over, the circumstance that one of the limitations is confined to a life interest, furnishes no indication of an intention to confine it to this life;" and he afterwards puts *Roe v. Jeffrey* on the true ground.\* In this case there are words sufficient to shew that the event on which the limitation over was to take place, was a proximate and not an indefinite failure of issue: that the testator contemplated his nephews and nieces taking immediately on the decease of his daughters: that he did not intend the legal and absurd, but the popular and rational sense of failure of issue: and the House cannot affirm the decree without stating *Doe v. Webber*, and repressing *Roe v. Jeffrey*. But if there be any doubt on that point, the strength of this case is this, — that after the gift to Caroline Harding there are alternative limitations of the fee or absolute interest one way to her issue, and another way to the nephews and nieces; that the former has failed and the latter (being the other branch of the alternative limitations), has taken effect.

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In the course of the argument the Lord Chancellor made the following observations: — Upon the effect of the word "such," that there was no case, so far as he knew, where that word was referred downwards to issue after-mentioned: that in *Targett v. Gaunt*† the literal meaning of the words was issue living at the death: that in the construction of these words the dis-

\* See *Murray v. Addenbrook*, 2 Russell, 407.

† 1 P. W. 432. Gilb. Eq. Rep. 149. 10 Mod. 403.

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inction between real and personal estate which is to be found in some of the cases, and prevailing in Fearne's\* time, had been very much narrowed; that Holroyd J. in one case said he hoped to live to see it abolished; and that this tendency of judicial opinion appears clearly in the Judgment of Sir W. Grant in *Barlow v. Salter*† that as to the words, "at that time" they made no difference in this case, because the question recurred at what time the cesser of the life estate or the extinction of the issue? that the argument from the specification of the individuals to take the estate upon the limitation over, was displaced by the decision in *Barlow v. Salter*; there it was to four nephews, here it was to sixteen persons named.

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At the conclusion of the argument for the Appellants, the Lord Chancellor without hearing the Respondents' Counsel proceeded to deliver his opinion as follows:—

I have looked at the Judgment in *Malcolm v. Taylor*. The words "as aforesaid," are in that case the substantive words to be considered. There were two antecedents, one of which was referred to by the words "as aforesaid:" both could not be referred to; the question was to which, and it was held to refer to the nearer, the subject matter stock being in the remoter antecedent and not in the nearer. There was something also in the particular manner in which the limitations were to vest in the children, and there were other peculiarities in the case; so that in that

\* See Fearne, C. R. 471. 9th Edit.; and see Mr. Butler's note (7) p. 477.

† 17 Ves. 479.

case, even without the words "as aforesaid," the Judgment would have been well founded. The law upon this subject in earlier times seems to have been fluctuating and unsettled; and it is not until lately that the principle of decision has been effectually, and by authority established, that if the gift over is simply "on failure of issue," "defect of issue," "dying without issue," &c. whether the words apply to real or personal property, it is to be construed a general failure of issue: the gift over is void, and in personal estate the implied limitation *quasi* in tail gives an absolute interest.\* But as an exception to this general rule of law, it has been allowed to look beyond the words preceding the gift over to the context, and if there are other words referring to the same subject matter, a preceding gift to children which as "*nomen collectivum*" may mean issue, it may in that case be construed to vest in the issue as purchasers. If therefore a gift to children, &c. immediately precedes the limitation over, upon a dying without *such* issue, you might read "without issue" or "such issue," that is children, &c. But merely because the word "children" is found in some prior part of the will not necessarily connected with the words in question, is not a satisfactory ground for resorting to this construction.

Mr. Jarman in his book† brings the cases together in a very convenient form, reducing to particular heads the instances in which "issue" is read "*such* issue," and construed children, &c. as

\* See *Doe v. Jesson*, 2 Bligh, O. S. 1.

† See Bythewood's Precedents, &c. by Jarman, vol. x. p. 57. Powell on Dev. by Jarman, vol. i. p. 388. Hayes & Jarman on Wills, 184.

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purchasers. There is not one case in which the words to furnish out or to aid the construction are not antecedent to the phrase "such issue," and the words preceding the limitation over. *Barlow v. Salter* is an important case bearing on this question. It is in that case apparent that Sir W. Grant had fully studied the subject. The question there in one respect resembled this, and in one respect was stronger, because the estate was given over to four nephews, a circumstance similar to the individuality of the sixteen objects to whom the gift over is made in this case, a ground upon which it was strenuously argued for the Appellants. There were not in that case the words "at the time." But you must construe those words rationally, and they are as consistent with the argument for the Respondent, as for the Appellants. The time indicated may be of issue living at the death of the first taker, or it may point to indefinite failure of issue. If the limitation can be made out by context to mean at the death, you do not want the words, for you have the estate by the limitation. If the other construction is put on them, the case is decided against the limitation over.

I have looked into the authorities, and I have no doubt upon the subject. I have also spoken to Lord Tenterden and the Judges; and if they had given me any reason to suppose that any argument of the case before them would have raised a difficulty or doubt, it would have been more agreeable to me that the question should be decided by the House, rather upon their advice than upon mine. I do not think, however, that it is a case for costs.

**Decree Affirmed.**

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## ENGLAND.

(COURT OF CHANCERY.)

WILLIAM NOTTIDGE and RICHARD } *Appellants;*  
 BLACK - - - - - }  
 GEORGE PRICHARD - - - - - *Respondent.*

P. and D., in the year 1814, commenced a partnership as solicitors. W. was a client of the firm, and employed D. as his private agent to receive his rents. The partnership was dissolved in 1817, when W. was indebted to the firm for a bill of costs in a sum of 867*l.*; and D., upon a settlement of the partnership accounts between him and P., was found indebted to P. in a sum of 750*l.*, for which he gave security, and agreed to assign to P. the outstanding partnership debts. Of this settlement, debt, and agreement notice was given to W. in 1821. During the partnership and afterwards D. had received monies on account of W. beyond the amount of the bill of costs: there was no evidence of any direction given by W. to D. to apply the monies received by D. on his account to the payment of the bill of costs, nor of any settlement of accounts between W. and D., but it was in evidence, that upon one occasion W. said to D. that he had better keep some money of W. which he had in his hands, as he might want it.

A bill in equity filed by P., stating these facts, and that D. had possession of the partnership books, to which P. had no access; that D. had refused to concur with him in suing W. at law, or to permit the use of his name for that purpose; and that by collusion between W. and D., the monies of W. received by D. had, as they pretended, been applied to payment of the partnership debt, and praying an account and payment of the debt, was dismissed by the Master of the Rolls; but on appeal to the Lord Chancellor, this order was reversed, and a decree for account and payment made against the executors of W., and this decree was affirmed on appeal. The costs of the appeal were given, notwithstanding this difference of opinion.

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IN 1821, the Respondent exhibited his original bill in the High Court of Chancery against Sir Thomas Maryon Wilson, Baronet, deceased, and Carter Draper, which was amended in 1823. The bill, as amended, stated that in the month of January, 1814, the Respondent agreed with Carter Draper to become a partner with him in carrying on the business of an attorney at law and a solicitor; and that the partnership business or profession was accordingly entered upon by Carter Draper and the Respondent, pursuant to such agreement; and the same was carried on and continued by and between the Respondent and Carter Draper, as such partners, from the month of January, 1814, until the month of October, 1817, at which last-mentioned period the partnership, by the agreement of Carter Draper and the Respondent, was dissolved: that at the time of the dissolution of the partnership, there were many outstanding debts owing from divers persons to the partnership, amongst which was a very considerable debt, owing from Sir Thomas Maryon Wilson, to the partnership for business theretofore done and transacted; and disbursements theretofore made by Carter Draper and the Respondent, as the solicitors and attornies of Sir Thomas Maryon Wilson, during the continuance of the partnership; that the disbursements of the partnership were made by Carter Draper alone, but nevertheless out of the monies of the Respondent alone; and that all the accounts of the partnership, and of all the payments and receipts of the partnership, were kept and made out by Carter Draper alone; and that upon the dissolution of the partnership, all the

written accounts, vouchers, day books, ledgers, and books of account belonging to the partnership, were taken by Carter Draper into his possession, and the same had ever since been and were then in his exclusive possession and power, and he had never since allowed or permitted the Respondent to inspect or see the same or any of them; and that no bill of fees or disbursements had, previously to the said dissolution, been made and delivered to Sir Thomas Maryon Wilson, by and on the part of the Respondent and Carter Draper, or either of them, but the account of Sir Thomas Maryon Wilson was then an open and unadjusted account; and that Sir Thomas Maryon Wilson was, in the month of October, 1817, informed and aware of the dissolution of partnership: that some time after such dissolution, and subsequently to November, 1817, a bill and account of the said fees and disbursements, and of the amount due for the same, from Sir Thomas Maryon Wilson to the partnership, was made out by Carter Draper without the Respondent's privity, and delivered to Sir Thomas Maryon Wilson by Carter Draper, without the privity and knowledge of the Respondent; and that the Respondent, for the reasons aforesaid, was ignorant and uninformed of the particulars of the partnership accounts, and more especially of the particulars and items composing the debt due from Sir Thomas Maryon Wilson, and of the bill of account delivered to Sir Thomas Maryon Wilson as aforesaid, though the Respondent had reason to know, and showed the fact to be, that the sum total of the bill, to wit; of the amount justly due from Sir Thomas Maryon Wilson to the partnership, amounted to the sum of 867*l.* and upwards.

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The bill further stated, that Carter Draper from time to time, during the continuance of the said partnership, applied to his own separate use, from the receipts and profits of the partnership, very large sums of money, greatly exceeding the proportion thereof, to wit, a moiety, to which he was entitled: and that by reason thereof, and by reason of the Respondent having paid and expended for and on account of the partnership business, and also for and on account of the said Carter Draper, as partner as aforesaid, divers sums of money to a very considerable amount, there appeared to be, and was in fact, at the time of the dissolution of the partnership business, a very considerable balance, amounting to 750*l.* in favour of the Respondent due and owing to him from Carter Draper, upon the accounts of the partnership, independently of, and besides the Respondent's share of the then outstanding debts owing thereto; that such sum of 750*l.* was then due from Carter Draper to the Respondent, with interest thereon; and that in or about the month of February then last past, the Respondent and Carter Draper met, and took together an account of the monies due and owing to the Respondent by Carter Draper, on the partnership account; and thereupon certain articles of agreement, bearing date the 22d of February, 1821, were entered into and signed between and by the Respondent of the one part, and Carter Draper of the other part; by which articles of agreement, after reciting that the said partnership had been carried on between the Respondent and the said Carter Draper, as attornies and solicitors, from the month of January, 1814, until the month of October, 1817, under the firm of Messrs. Prichard



and Draper, when the same was dissolved by mutual consent; and after reciting that no deed of partnership, or deed of dissolution thereof, was ever executed between the Respondent and the said Carter Draper, who had mutually agreed that each should take to his own business, and that the said Carter Draper should repay to the Respondent the monies paid, laid out, and expended by the Respondent, for and on account of the said Carter Draper: And after reciting that the Respondent and the said Carter Draper had met and examined the accounts of the monies so advanced by the Respondent, from which it appeared that the sum of 750*l.* then remained due to the Respondent from the said Carter Draper, which the said Carter Draper, being unable to settle, had agreed to secure the repayment thereof, with interest, to the Respondent, in manner therein-after mentioned; it was agreed by the parties thereto, that the said Carter Draper should give to the Respondent his bond, bearing date the day of the date of the said articles of agreement, for the sum of 750*l.*, to be payable, &c. And the said Carter Draper thereby also agreed, as a further security for the said sum of 750*l.* so due to the Respondent, to assign to the Respondent the debts contracted during the said copartnership, and which then remained outstanding and due to the said firm of Prichard and Draper. And, lastly, he, the said Carter Draper, did thereby undertake and agree, within one month from the date thereof, to supply the Respondent with a list of debts then remaining outstanding and unpaid to the said partnership firm of Prichard and Draper.

The bill further stated, that no part of the account delivered by Carter Draper to Sir Thomas

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between Carter Draper and Sir Thomas Maryon Wilson, in respect of their dealings and transactions, and Carter Draper's agency, subsequent to the dissolution of partnership, were then still open, unsettled, and in dispute between them, and that a suit in the Court of Chancery, between Sir Thomas Maryon Wilson, complainant, and Carter Draper, Defendant, was then pending, wherein Sir Thomas Maryon Wilson sought an account and payment of all sums received by Carter Draper on account of Sir Thomas Maryon Wilson, and sought also a taxation as well of the bill of fees and disbursements of the Respondent and Carter Draper, as of other bills; and that Sir Thomas Maryon Wilson disputed the amount of the bill of fees and disbursements of the Respondent and Carter Draper; and that there never, subsequently to the commencement of the partnership, had been any account stated or settled or any settlement of account whatsoever between the Defendants: the bill further charged, that the Respondent never authorized the making of any payment by Sir Thomas Maryon Wilson to Carter Draper, on account of the bill or partnership demand, or any part thereof; and that Carter Draper was in insolvent or embarrassed circumstances; and that in or about the month of February then last, the Respondent called upon Sir Thomas Maryon Wilson, and a conversation then took place between the Respondent and Sir Thomas Maryon Wilson, when he informed the Respondent that Carter Draper had, since the dissolution of partnership between the Respondent and Carter Draper, possessed himself of various sums of money collected by him for Sir Thomas Maryon Wilson to the amount of about 2000*l.*, and Sir Thomas

Maryon Wilson in the same conversation, in speaking of the bill delivered by Carter Draper to Sir Thomas Maryon Wilson for business done and disbursements made by the Respondent and Carter Draper during the partnership, declared, that he Sir Thomas Maryon Wilson was fully aware that Carter Draper could not make a set-off of such bill against such monies, and further declared that Carter Draper must separately account to him Sir Thomas Maryon Wilson for the whole of the rents and monies that Carter Draper had collected for and on account of Sir Thomas Maryon Wilson.

The bill further charged, that on the 17th of February, 1821, the Respondent caused to be delivered to the solicitors for Sir Thomas Maryon Wilson a written notice not to pay to Mr. Carter Draper the balance of any bill or bills delivered in by him as due from Sir Thomas Maryon Wilson, to the late firm of Messrs. Prichard and Draper, and not to allow Carter Draper any set-off in his accounts with Sir Thomas Maryon Wilson, for and on account of any balance or balances of bills, &c. : that on the 27th of February, 1821, the Respondent caused a copy of the agreement to be delivered to Stride and Lyddon, as solicitors for Sir Thomas Maryon Wilson, accompanied with a notice, that the agreement had been signed by the Respondent and Carter Draper: that Sir Thomas Maryon Wilson pretended that no bill of fees and disbursements had been delivered to him by or on the part of the Respondent and Carter Draper. And the bill further charged that the Respondent, without a discovery from Carter Draper and Sir Thomas Maryon Wilson, was unable to prove the delivery to Sir Thomas Maryon Wilson of any such bill,

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and that by reason of the books of account being in the hands and power of Carter Draper, the Respondent was altogether unable to make out any bill of fees or disbursements against Sir Thomas Maryon Wilson, and unable to state or set out the particulars or items of the demand upon him: and that Sir Thomas Maryon Wilson, when he admitted, as he frequently, according to the truth, did, that the said debt from him to the firm of Prichard and Draper, was still due and owing, threatened and gave out (in collusion with Carter Draper), that in order to deprive the Respondent thereof, and to facilitate the payment of what Carter Draper, on his separate account, was alleged to owe to Sir Thomas Maryon Wilson, he would pay to Carter Draper the debt due from Sir Thomas Maryon Wilson to the firm of Prichard and Draper, and that the defendants, in collusion together, were causing to be prepared a deed of absolute release from Carter Draper to Sir Thomas Maryon Wilson of his said debt, which deed Carter Draper intended forthwith to execute and deliver to Sir Thomas Maryon Wilson; and thereupon Sir Thomas Maryon Wilson intended to allow Carter Draper, in the Accounts between them, or otherwise, to pay him the amount of the debt due from Sir Thomas Maryon Wilson to the firm of Prichard and Draper: and Sir Thomas Maryon Wilson threatened and intended to set up such deed of release against the Respondent's demand in respect of such debt.

The bill further charged that divers other writings and papers, of a similar nature and tendency, were lately in the custody or power of the Appellants and the other defendant, respectively, but that they had wilfully destroyed or secreted

he same, and that they ought to have accounted for the same, and to have set forth the purport and effect thereof.

The bill prayed that an account might be taken, under the direction and decree of the Court, of what was due and owing at the dissolution of the said partnership, from the said Sir Thomas Maryon Wilson to the said Respondent and the said Carter Draper as partners; and that the bill of the said late firm of Prichard and Draper, against the said Thomas Maryon Wilson, might, if it should be necessary, or proper, be taxed as between solicitor and client; and that in taking such accounts as aforesaid, the said Sir Thomas Maryon Wilson might not be allowed any set-off, or credit, for or in respect of any sum or sums of money whatever, received, or pretended to have been received by the said Carter Draper, for and on account of the said Sir Thomas Maryon Wilson, since the dissolution of the said partnership. The bill also prayed that the said Sir Thomas Maryon Wilson might be decreed to pay what should be so found due from him in manner aforesaid into the hands of the Respondent, or into the Bank, in the name of the Accountant-General of the High Court of Chancery, in trust in that cause for the purposes of the said agreement, and subject thereto for the benefit of the said Respondent and the said Carter Draper; and that the said Carter Draper might be decreed to allow, and permit, the said Respondent to make use of the said Carter Draper's name, in, and for, suing the said Sir Thomas Maryon Wilson, at law, if necessary or proper, in respect of the said demand upon him and all costs of that suit, and might be restrained from doing

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any act to defeat such a proceeding, or to prevent the said Respondent from having the sole benefit thereof; and that the said Carter Draper and the said Sir Thomas Maryon Wilson might be decreed to pay all the costs of the suit, and that they might be restrained respectively by the order and injunction of the said Court from receiving or taking any credit, or executing or giving any release or discharge for, and the other from allowing, or paying, save as thereby prayed, any sum or sums of money on account or in respect of the said debt due from the said Sir Thomas Maryon Wilson, to the late firm of Prichard and Draper; and that the said Sir Thomas Maryon Wilson and his attornies and agents, might in such action at law as aforesaid, if such should be brought, be in like manner restrained from making use of, or giving in evidence, any release, receipt, or payment subsequent to the said dissolution.

Sir Thomas Maryon Wilson died without having put in any answer to the bill, and the Respondent, in the month of November, 1821, filed a bill of revivor against the Appellants and John Stride, the executors and personal representatives of Sir Thomas Maryon Wilson, and the suit was duly revived.

In the month of February, 1822, the Appellants and John Stride put in their answer to the bill of revivor and original bill, and by their answer to the original bill insisted upon the right of set-off, and stated upon information and belief that from the time of the dissolution of the partnership to the year 1821, no notice had been given by the Plaintiff to Sir Thomas Maryon Wilson not to settle accounts with Carter Draper; and that in the mean time

Carter Draper had received rents for Sir Thomas Maryon Wilson to an amount sufficient to discharge the debt under the right of set-off.

In the month of November, 1823, the Respondent filed a supplemental bill stating, amongst other things, that on the 27th of May, 1823, he delivered to John Stride, as one of the executors of Sir Thomas Maryon Wilson, deceased, for himself and the other executors of Sir Thomas Maryon Wilson, a bill of fees, charges, and disbursements, for business transacted and money advanced and paid for the use of Sir Thomas Maryon Wilson by the Respondent and Carter Draper, as attornies and copartners, and which said bill of fees, charges, and disbursements, was signed by the Respondent, and was a bill conformable in all respects to the statute in such behalf made and provided, and that no proceeding for the taxation of such bill so delivered had ever been taken.

The Appellants, and the Defendant, John Stride, put in their answer to the supplemental bill in the month of February, 1824, and thereby the delivery of the bill of fees, charges, and disbursements, was, with some qualifications, admitted.

The usual proceedings having taken place in the cause, and the same being at issue, a witness was examined on the part of the Respondent, and various admissions were signed, both by the solicitors of the Appellants and the Defendant John Stride, and the solicitors of the Respondent. The admissions signed by the solicitors of the Respondent were in part as follows:—

That the said Sir Thomas Maryon Wilson, Baronet, deceased, employed the said Carter Draper as his attorney and solicitor, from the dissolution of

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the said partnership between the said Respondent and the said Carter Draper in like manner as the said Sir Thomas Maryon Wilson had employed the said Carter Draper as his attorney and solicitor before the formation of the partnership between the said Respondent and the said Carter Draper; and that the said Respondent knew, and was aware, that the said Sir Thomas Maryon Wilson continued to employ the said Carter Draper as his solicitor, after such dissolution of partnership; and that amongst the documentary evidence so admitted by the solicitors of the said Respondent, was a letter addressed by the said Respondent to the said Carter Draper, dated the 27th of October, 1818, in which the said Respondent asked the said Carter Draper the following question: — “Will Sir T. W. soon “settle?” and it was admitted that the said Sir Thomas Maryon Wilson is the person alluded to by the said style and initial letters “Sir T. W.”

The cause was heard on the 6th of July, 1826, before Lord Gifford, then Master of the Rolls, when his Lordship was pleased to order and decree that it should be referred to the Master in rotation, to tax the bill of fees, charges, and disbursements, of the Respondent and Carter Draper, and it was ordered that the Master should take an account of what, if any thing, was due and owing from the estate of the said Sir Thomas Maryon Wilson, deceased, in respect of the said bill of fees, charges, and disbursements, and the Master was to be at liberty to state any special circumstances that might arise, at the request of either party, &c.

James William Farrer, Esquire, the Master to whom the cause was referred, made his report, bearing date the 11th of November, 1828, whereby



he found and stated that the bill of fees, charges, and disbursements of the Respondent and Carter Draper, amounted to 868*l.* 15*s.* 8*d.*, which he had taxed at the sum of 768*l.* 15*s.* 8*d.*; and for the purpose of taking the account of what, if any thing, was due and owing from the estate of the said Sir Thomas Maryon Wilson, deceased, he had caused the said Carter Draper to be examined on interrogatories exhibited before him, by the said Respondent and the said Appellants; and he found that by a claim laid before him on behalf of the said Appellants, which had been duly vouched by the production of proper vouchers before him, that the said Sir Thomas Maryon Wilson, deceased, paid to the said Carter Draper, on account of the said bill of fees, charges, and disbursements, the several sums of money in the first schedule to that his report annexed, amounting together to the sum of 326*l.* 9*s.*, and which last-mentioned sum being deducted from the aforesaid sum of 768*l.* 15*s.* 8*d.*, the same was thereby reduced to the sum of 442*l.* 6*s.* 8*d.* which he found to be remaining due and owing from the estate of the said Sir Thomas Maryon Wilson, in respect of the said bill; and the said Master by his said report further stated, that being at liberty to state special circumstances, at the request of either party, he submitted to the court, at the request of the Appellants, the following circumstances: — In and previous to the year 1814, the said Carter Draper was the solicitor of the said Sir Thomas Maryon Wilson; in that year the said Respondent and the said Carter Draper entered into copartnership as solicitors, and continued in such copartnership until October, 1817, when the same was dissolved. During the con-

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tinuance of the said copartnership the said Sir Thomas Maryon Wilson employed the said Respondent and the said Carter Draper as his solicitors, and the said Sir Thomas Maryon Wilson was aware of the dissolution of the said copartnership shortly after the time thereof. On the 25th of July, 1818, a joint bill of costs was delivered by the said Carter Draper to the said Sir Thomas Maryon Wilson, the amount of such bill was 867*l.* 5*s.* 5*d.*, including a sum of 67*l.* 17*s.* 5*d.* as the balance of a former bill of the said copartners, and the said bill was accompanied by a letter, written by the said Carter Draper, bearing date the 25th of July, 1818, and was in the words and figures following:—“Exchange Buildings, 25th July, 1818. Dear Sir, “At length I am enabled to send you my accounts, “which are three in number; the first is due to “Prichard and Draper of 867*l.* 5*s.* 5*d.*, from which “I believe there have been received the several “sums of 50*l.*, 26*l.* 9*s.*, 28*l.* and 300*l.*; the second “is also due to Prichard and Draper, and is the “separate account of the parish of Fletching; the “third account is owing to Draper and Bird, “wherein I have given you credit for the money “received from Furness for rent. At the bottom “of the first bill I have not put the receipts on account, lest by any means I may have made a “mistake, but I am not conscious of having so “done. I remain, Dear Sir, most respectfully “yours, Carter Draper. Sir Thomas Maryon “Wilson, Bart.” And that in a letter written by the Respondent to the said Carter Draper, bearing date the 27th of October, 1818, the said Respondent used the following expression, “Will Sir T. W. soon settle?” and that it was admitted that the said

Sir Thomas Maryon Wilson was the person alluded to by the style and initial letters "Sir T. W.;" and the said Respondent, George Prichard, knew and was aware that the said Sir Thomas Maryon Wilson continued to employ the said Carter Draper as his solicitor after the said dissolution of partnership; and that on the 17th of February, 1821, the said Respondent gave a notice to the solicitors for the said Sir Thomas Maryon Wilson not to pay the said Carter Draper the balance of any bill or bills delivered in by him as due from Sir Thomas Maryon Wilson to the late firm of Messrs. Prichard and Draper; and that on the 22d of February, 1821, the said Respondent and the said Carter Draper signed an agreement by which the said Carter Draper agreed to give the said Respondent his bond for securing the sum of 750*l.*, payable by instalments, and to assign to the said Respondent the debts contracted during the partnership, and which then remained outstanding and due to the said firm of Prichard and Draper; and the said Carter Draper undertook, within one month, to supply the said Respondent with a list of debts then still remaining outstanding and unpaid to the said partnership firm of Prichard and Draper, but that it did not appear before the said Master that any such list had been supplied: And that on the 22d of February, 1821, the said Respondent delivered a copy of such agreement to the solicitors for the said Sir Thomas Maryon Wilson: And that the said respondent did, on the 28th of February, 1821, write and send the letter to the said Sir Thomas Maryon Wilson, in the said bill mentioned, explanatory of such notice: And that after the said dissolution of copartnership the said Carter Draper continued to act as solicitor and

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receiver of rents of estates of the said Sir Thomas Maryon Wilson, and continued so to act until after September, 1820: And that, on the 22d of February, 1821, the said Sir Thomas Maryon Wilson filed his bill of complaint in his Majesty's High Court of Chancery, against the said Carter Draper, his late attorney and solicitor and agent and receiver for an account; and that the Appellants, with the said late defendant, John Stride, as executors of the said Sir Thomas Maryon Wilson, after his decease, filed a bill of revivor of such suit against the said Carter Draper, and that such suit was then still pending, and that the said Respondent had examined the said Carter Draper as a party in that cause upon interrogatories exhibited before the said Master: And he found by his examination put in thereto, sworn the 1st of February, 1828, that the said Carter Draper stated that he did not, since the dissolution of the partnership between the said Respondent and the said examinant, settle and adjust any accounts with the said late Defendant Sir Thomas Maryon Wilson, deceased, nor did the said Sir Thomas Maryon Wilson ever adjust or agree with the said examinant any account or accounts in which credit or credits was or were given to him for any sum or sums of money as having been paid to the said examinant expressly for or on account of any bills of costs, or for monies retained by the said examinant expressly for or on account or in satisfaction or part satisfaction of any bill of costs, nor did the said Sir Thomas Maryon Wilson, to the knowledge and belief of the said examinant, ever debit the said examinant with any sum or sums of money expressly on account of any bill of costs: And the said examinant stated that the said Sir

Thomas Maryon Wilson did not ever, in writing or in any account in writing, expressly allow to the said examinant any sum or sums of money expressly in payment and satisfaction, or in part payment or satisfaction of any account: And the said examinant stated that his accounts with the said Sir Thomas Maryon Wilson had not been settled: The Master further certified that the said Appellants, the executors, had also examined the said Carter Draper, as a party in this cause, upon interrogatories exhibited before him: And he found that the said Carter Draper, by his examination sworn the said 1st of February, 1828, stated that he did receive from, and was paid by Sir Thomas Maryon Wilson, Baronet, deceased, in manner therein-after mentioned, the whole amount of the bill of costs of the late partnership between the said examinant and the said Respondent, due from the said Sir Thomas Maryon Wilson at the time of the dissolution of the said late copartnership: And the said examinant stated that the said bill of costs was paid, or the said examinant received the amount thereof at various times, and by various sums of money, some of which sums were paid to the said examinant by the said Sir Thomas Maryon Wilson, and others of them by monies retained by the said examinant by the direction or with the permission of the said Sir Thomas Maryon Wilson, out of monies belonging to him, which had been received by the said examinant: And the said examinant stated that, to the best of his recollection and belief, there was not any person present when such monies or any of them were paid to the said examinant, or when the said Sir Thomas Maryon Wilson directed or permitted the said examinant

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to retain such monies as the said examinant did retain: And the said examinant stated that he had in the schedule to his said examination, underwritten or annexed, set forth a true statement or account, to the best of his belief, of the monies which the said examinant so received from the said Sir Thomas Maryon Wilson or retained; but the said examinant stated he did not recollect or believe that such monies, or any part of them, were retained by the said examinant expressly on account of such bill of costs, for the said examinant stated; that when the said examinant had monies of the said Sir Thomas Maryon Wilson in his hands, the said Sir Thomas Maryon Wilson told the said examinant to retain what he wanted, as money would be of use to him the said examinant: And the said examinant stated he accordingly retained the monies in the said schedule mentioned, and that, to the best of his belief, there was not any money due from the estate of the said Sir Thomas Maryon Wilson deceased, on account of the bill of costs of the late partnership between the said Respondent and the said examinant: And the said examinant stated that the said bill of costs was in fact paid and settled on the 10th of September, 1820, when the sum of 282*l.* 17*s.* 5*d.* was retained by the said examinant: And the said examinant stated that he did not recollect that any thing particular passed on the occasion; but it was of course understood by him, and he believed by the said Sir Thomas Maryon Wilson, that credit was to be given by the said examinant in his accounts with the said Sir Thomas Maryon Wilson for the sums so paid to and retained by the said examinant when the account should, at

any future time, be settled between the said examinant and the said Sir Thomas Maryon Wilson, and for that reason also the said examinant stated he did not make, or give, or was not required to make or give, any receipts or receipt for the monies which were so paid to or retained by the said examinant as aforesaid: And the said Master certified that he had set forth the schedule to such last examination by way of second schedule to that his report annexed.

The first schedule to which the Master's report referred, containing a statement of the several sums of money paid by Sir Thomas Maryon Wilson deceased, to Carter Draper, on account of the bill of fees, charges, and disbursements of the Respondent and Carter Draper, was as follows:—

|                 |                                                                                       | £.  | s. | d. |
|-----------------|---------------------------------------------------------------------------------------|-----|----|----|
| 1816. Oct. 7th. | Cash paid by the said Sir Thomas Maryon Wilson, to the said Carter Draper, on account | -   | -  | -  |
|                 |                                                                                       | 26  | 9  | 0  |
| 1817. Oct. 7th. | Ditto                                                                                 | -   | -  | -  |
|                 |                                                                                       | 300 | 0  | 0  |

The second schedule to which his report referred, containing the account or schedule to the examination of Carter Draper to the interrogatories exhibited before him by the Appellants, was as follows:—

|                  |                                                  | £.                | s.  | d.   |
|------------------|--------------------------------------------------|-------------------|-----|------|
| 1814. Nov. 20th. | Received from Sir Thomas Maryon Wilson himself   | 121               | 14  | 10   |
| 1816. Oct. 8th.  | Ditto                                            | -                 | 26  | 9 0  |
|                  | Ditto (date not known, but some time in 1816)    | -                 | 28  | 0 0  |
| 1817. Oct.       | Ditto                                            | -                 | 300 | 0 0  |
| 1820. Feb. 5th.  | Retained out of Sir Thomas Maryon Wilson's Rents | 300               | 0   | 0    |
| Sept. 10th.      | Ditto the Balance                                | -                 | 282 | 17 5 |
|                  |                                                  | <u>£1,059 1 3</u> |     |      |

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The cause was heard on further directions before the Master of the Rolls, on the 28th of January, 1830, when his Honor decreed that the Respondent's bill should stand dismissed, and that the Respondent should pay to the Appellants the costs of the suit up to the hearing, to be taxed in the usual manner.

The Respondent presented his petition of appeal to the Lord Chancellor, from the last-mentioned order or decree, on further directions, and prayed that the same might be reversed, and that further directions might be given by his Lordship upon the Master's report, and a decree made thereon.

The petition of appeal was heard before the Lord Chancellor on the 5th of July, 1831, when his Lordship ordered that the order made in the cause, bearing date the 28th of January, 1830, be reversed. And it was ordered that the Appellants, the surviving Defendants in the second and third mentioned causes, the surviving acting executors of the late Defendant, Sir Thomas Maryon Wilson, Bart., deceased, admitting assets, should pay to the Respondent the sum of 442*l.* 6*s.* 8*d.*, by the Master's report made in the said causes, bearing date the 11th of November, 1828, found to be due from the estate of the said Sir Thomas Maryon Wilson, in respect of the bill of fees in the pleadings mentioned, out of the assets of the said Sir Thomas Maryon Wilson, in a course of administration; and it was ordered that the said Master should tax the Respondent his costs of the said suit; and it was ordered that the said Appellants should pay to the Respondent what should be taxed for such costs; and it was ordered that the sum of 20*l.*, deposited by the Respondent with the Re-



gistrar, on setting down his petition of appeal, should be paid back to the Respondent, &c.

The appeal was from this order.

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For the Appellants, Mr. *Pemberton* and Mr. *Cooper*.

For the Respondent, Sir *E. Sugden* and Mr. *Knight*.

For the Appellants.

Upon a dissolution of partnership, either partner is at liberty to receive the debts, unless there are special circumstances to displace the right. *Duff v. E. J. Co.*\*; *Bristow v. Taylor*.† Monies were received by Draper, on account of Sir T. Wilson, after the dissolution of the partnership, with the knowledge of Prichard, which Draper might apply to the payment of the debt. The objections taken before the Master of the Rolls to the evidence of Draper were overruled, for he was not interested; and the bill was dismissed. This judgment was reversed by the Lord Chancellor:—But half the claim was disallowed. The reversal of the judgment proceeded chiefly on the ground that there was no direction by Sir T. Wilson to apply the monies to the payment of the debt; that there was no settlement of accounts, and that there could not be a set-off of the private debt against the partnership debt. In the bill, it is not pretended that no payments were made after the dissolution of the partnership, but only that they were made after notice.

\* 15 Ves.

† Starkie.

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*The Lord Chancellor.*—This is a question of fact. The law is indisputable, that a partner may receive a partnership debt after a dissolution. The question here is, whether there was a payment.

For the Appellant.

The question is, whether the law will not make the appropriation of the monies received, and in the hands of the partner. Suppose the notice not given, would not Prichard himself have contended justly that the monies must be so applied? His view appears by his letter, wherein he asks, "Shall I soon receive the monies due from Sir T. Wilson?" He applies to Draper, not to Sir T. Wilson. Draper's demand on Sir T. Wilson was in a double character, — as a partner, and as an individual; but as he received more than sufficient to satisfy both debts, the law appropriates the money, and the other partner cannot demand a second payment of the debt, and throw the debtor for his remedy upon the insolvent partner.

The remedy, if any, ought to be at law. The only ground alleged for proceeding in equity, is the refusal by the partner to concur in the recovery of the debt.

After a dissolution, either a receiver is appointed to collect the partnership debts, or all the partners receive and account with each other; in which latter case, a payment to any one of them is a discharge of the debt.

*The Lord Chancellor.*—The whole question is, whether the payment to Draper was in liquidation of the debt to the concern. If he had continued a partner, it might have been argued that the payment was to be applied to the partnership debt. The employment of Draper as a private agent

afterwards, makes it necessary to direct the application of the payment.

For the Appellant.

Here the partnership debt was the first in date.

The *Lord Chancellor*.—Do you push the doctrine of priority of debt so far, that if the partnership is dissolved, and payment is made to one of the partners, becoming agent to a client who is indebted to him separately, you must of necessity ascribe the payment to the partnership debt?

For the Appellants.

If the plaintiff proposed to raise the question, whether Sir T. Wilson intended that the partnership debt should be paid by receipt of his rents, the plaintiff should have amended his bill, to put that fact in issue. There was a general authority to retain monies of Sir T. Wilson, and it was acted upon. No specific authority for the appropriation was necessary, according to the principle established in *Devaynes v. Noble*.\* In the absence of specific authority the payment was applicable to the debt first in point of date. If Sir Thomas Wilson had become insolvent, Draper must have shewn a specific authority as against Pritchard, to prove that the money was not received on account of the partnership debt.

The *Lord Chancellor*.—In the case of *Devaynes v. Noble*, the monies were due in the same right. Can you shew any case at law where payment is made to one partner, who has debts in different rights, where the doctrine of priority has been applied? Here retainer must be set off.

For the Appellant.

The case on which the bill rests, is an allegation

\* 3 Meriv.

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that the bill of costs was not satisfied prior to 1821 ; and a charge that, by collusion between Sir Thomas Wilson and Draper, subsequent to 1821, the set-off was manufactured. The Master of the Rolls was of opinion that the case appearing on the Master's report was different from the case made by the bill, which stands upon a charge of collusive payments. This is a different equity from that on which the judgment of the Lord Chancellor proceeds. That judgment rests mainly on the evidence of Draper.

If specific directions were necessary as to the application of the payment, the answer having tendered that issue, the Plaintiff was bound, according to the rules of pleading in equity, to amend the bill. That question would then have been put in issue, and the defendants might have given evidence of the usage of the partnership as to the liquidation of accounts. The case ought to be very clear to induce a Court of Equity to interfere. A debtor who has paid to one partner enough to satisfy both private and partnership debts, has a stronger equity than a partner who complains of the default of his co-partner.

This was a case of opposite judgments, and at all events the costs ought not to have been given against the Appellants.

For the Respondent.

There is no evidence on the part of the Appellants of any payment or other discharge of the debt, admitted to have been incurred by Sir Thomas Maryon Wilson to the firm of Prichard and Draper, and wholly vested in the Respondent ; neither is there any thing in the case to affect his right to recover the same. Upon the footing of the examination of the co-defendant, Carter

Draper (supposing the same to be admissible against the Respondent), there is nothing to establish the fact of a payment, in discharge of the partnership debt, by Sir Thomas Maryon Wilson, or to affect the right of the Respondent to recover the same; nor is there any thing in the dealings or transactions which took place between Sir Thomas Maryon Wilson and Carter Draper, subsequently to the dissolution of the partnership of Prichard and Draper, which amounts to a legal or equitable payment, satisfaction, or extinguishment of the debt, due by Sir Thomas Maryon Wilson to the partnership, by way of set-off or otherwise; and the defence of the Appellants, being reduced to a mere attempt to set off the separate debt due by Carter Draper to the estate of Sir Thomas Maryon Wilson against the debt due from that estate to the partnership of Prichard and Draper, to the prejudice of Prichard, must necessarily fail, as directly contrary to the whole current of the decisions both at law and in equity.

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*The Lord Chancellor.*—This is a question which, if there was any doubt in point of law, I should take time for consideration. It is in effect a rehearing before the same judge. If I thought that there was any grave doubt upon the question, or any miscarriage below, I should be anxious to set it right. Nothing can be more against the interest of any judge, than to expose himself to the imputation that he has been the means of introducing error into the law. His interest, if any, is the other way. This is no question of law. It was argued upon the appeal before me in the Court of Chancery, that there was an objection to the evidence of Draper; but the evidence was properly

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admitted. When the cause was heard\*, I referred to the Chief Justice, who was then sitting at Guildhall, and he stated that he had no doubt upon that point. The next question arose upon the defect of service of the bill of costs, under the statute of Geo. 2.; and I should have been of opinion that this would have been fatal against this demand, because solicitors are as much within the statute as attornies at law: and it was not cured by a delivery of the bill after suit commenced. But the objection not having been taken before the Master of the Rolls, was too late on the appeal. If it is to be considered as a question of set-off, the debts are not of a similar quality; one is separate, the other joint. Upon an action (and this is equivalent to an action), a debt from A. could not be set off against a debt owing to A. and B. If, therefore, it is a case of set-off, *cadit questio*.

But in order to raise the question, and meet it fairly, let it be treated as a case of retainer and payment. Here the payment may be considered equivocal. Its character depends upon Draper's evidence; and the only question is, whether that evidence proved it to be the payment of the joint debt, being in its nature ambiguous. That question is to be disposed of by the evidence of Draper. I agree to the propositions of law as argued for the Appellant, first, that a debtor paying the debt to one partner, after a dissolution of the partnership, the payment is a discharge of the debt.† Any one of the partners may receive and discharge the debt. The second proposition is equally clear, that if there is a dealing with a firm, and debts are incurred, and a subsequent payment is made, and nothing passes at the time of payment, no in-

\* See 1 Russ. & M. 199.

† *Duff v. E. I. Co.* 15 Ves. 198.

structions how the payment is to be applied, the law presumes that priority of obligation prevails.\* This is consonant to the principles of honesty, and favourable to the creditor, since it avoids the effect of the statute of limitations. The doctrine is recognised in the case of *Devaynes v. Noble*†, and has frequently been applied in courts of law; but I never heard the doctrine extended to cases where the parties claim *diversis juribus*. It does not follow as a necessary consequence that a debtor to a partnership firm, making a payment to one of the partners, after a dissolution, intends the payment to be applied to the debt owing to the firm. It may be that the payment is to the individual who receives it. The principle, if admitted, does not bear out the argument. Then it comes to a question of fact: Did any thing pass at the time of payment by way of general or particular instructions to apply the money to the payment of the partnership debt? Draper says that he considered the debt extinguished; but that is an inference of law; for he afterwards says that Sir Thomas Wilson did not “expressly allow any sum in payment of any account,” and that he did not recollect or believe that such monies were retained by him expressly on account of the bill of costs, for that when he had monies of Sir T. Wilson in his hands, he, Wilson, told him to retain what he wanted, as money would be of use to him. The words rather shew that the retainer was intended to favour Draper personally, not the partnership, and the question, whether Wilson gave authority to retain the rents to pay the partnership debt, is negatived.

\* *Whiston v. Taylor*, 2 Stark. 50.

† 1 Meriv. 608.

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As to costs, I am inclined to advise the House to give the costs of the appeal. It may be said, that here was a discrepancy of opinion between the Courts below; but this argument might introduce a dangerous practice. If costs are to be refused as a matter of course, because there is a difference of opinion between the inferior Courts, then, whenever there is such difference of opinion, there will be always an appeal. The decrees and orders of the Vice-Chancellor and Master of the Rolls are often reversed upon re-hearing before the Lord Chancellor, on grounds not presented or discussed before those judges. Sometimes, upon evidence introduced after the original hearing of the cause, the re-hearing and discussion, upon new grounds or new evidence, enables the superior Court rather to reform or revise, than to reverse the judgment. Upon an appeal motion lately before me, for an injunction in the case of a charity, I had at first an opinion that there was no ground for the application; but when the same matter came before me a second time, upon farther consideration, I was very clearly of opinion that the Master of the Rolls was wrong, and that I had been equally wrong myself upon my first impression. If that case should be brought here by appeal, I should be disposed to advise that the costs should be given, notwithstanding the difference of opinion.

The case stood adjourned to the 5th of July, when the Lord Chancellor said, that upon consideration he should advise the House to dismiss the appeal with costs.

Decree affirmed, with costs.



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## ENGLAND.

(COURT OF CHANCERY.)

|                              |   |                    |
|------------------------------|---|--------------------|
| DAVID COLVIN, WILLIAM CRAW-  | } | <i>Appellants.</i> |
| FORD, and JAMES GATHORNE RE- |   |                    |
| MINGTON - - - -              |   |                    |

|                      |                    |
|----------------------|--------------------|
| JOHN CAMPION - - - - | <i>Respondent.</i> |
|----------------------|--------------------|

An order of the Court of Chancery directed the new trial of an issue, and a commission for examination of witnesses abroad; and that the trial of the issue should be stayed until the return of the commission. The parties having improperly delayed the execution and return of the commission, upon application to the Court the whole of the original order was discharged. But upon appeal, held, that the laches as to the commission ought not to affect the right to proceed to a new trial of the issue; and as regarded this last point the order was reversed, with special directions.

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IN Trinity Term, 1823, the East India Company filed a bill of interpleader in the High Court of Chancery against the Respondent, and against the Appellants and their late partners, stating an Act of Parliament passed in the fifty-fourth year of George the Third, "enlarging the Powers of Two "Acts made in the forty-third and forty-sixth years "of his late Majesty King George the Third, for "the further Improvement of the Port of London; "making Docks and other Works at Blackwall "for the Accommodation of East India Shipping "in the said Port of London, and other Matters

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“therein mentioned;” whereby it was, amongst other things, enacted, That in the cases therein mentioned the Directors of the East India Company, or some officer or officers appointed by them for the purpose, should and they were thereby required to cause such goods, wares, or merchandizes, the produce of any place or places within the limits of the East India Company’s charter as should be brought into any of the said docks or basins therein mentioned on board any ship or vessel, to be duly entered at the custom-house, and thereupon to give security according to the law for the payment of the duties to which the same should be subject. And it was thereby further enacted, that all ships and vessels arriving in the inner dock should be cleared and discharged with all convenient speed; and goods, wares, and merchandizes imported in private trade which should be landed therefrom, and which should be bonded by the said East India Company, or otherwise howsoever, and which were prohibited goods, should without loss of time, unless in the case therein mentioned, be deposited in the warehouses of the East India Company, who should account to the East India Dock Company for the rates and duties payable to them in respect of the same; and that such goods, wares, and merchandizes should be sold under the authority of the Court of Directors of the East India Company, on account of the owners thereof; and the duties of customs and excise, and the rates, charges, and expences payable to the said East India Company in respect of the same, should be deducted and paid to the proper officers of his Majesty’s revenue, and to the said East India Dock Company, by the East India Company, subject, however, to such

proviso as therein mentioned; and that the master and owner, or owners, of every vessel from which any such goods, wares, and merchandize should have been landed should have the same lien upon the net proceeds of such goods, wares, and merchandize, for the freight thereof, as they would have been entitled to upon the same goods, wares, and merchandize before the landing thereof, if he or they should give notice in writing of his or their claim to lien, before such net proceeds should have been paid over to the consignees or owners of such goods, wares, and merchandize.

The bill then stated, that in the year 1818 the ship the *Hero*, being engaged in private trade to the East Indies, and commanded by John Price, as the master thereof, sailed from the river Hooghly, in the East Indies, destined to the port of London, having on board a cargo consisting of different sorts of goods, wares, and merchandize, shipped and consigned by different persons in the East Indies to different persons in England, and that the said ship or vessel, called the *Hero*, arrived on her said homeward bound voyage in the East India Docks in or about the month of April, 1818; and that at the time of the said arrival of the said ship there were on board of her, amongst other goods, wares, and merchandize, 511 bales of cotton wool, which had been shipped at Calcutta, in the East Indies, on board the said ship, and consigned to Messrs. Bazett and Co., meaning the Appellants, and the said Richard Campbell Bazett, and John Farquhar, since deceased, who then carried on the trade or business of merchants, in London, in copartnership, under the style or firm of Bazett, Farquhar, Crawford and Co.; and that the said goods,

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wares, and merchandize, brought into the said docks by the said ship at the time aforesaid, were under the provisions of the said Act of Parliament landed from the said ship, and sent to and deposited in the warehouses of the said East India Company; and that shortly after the arrival of the said ship, the Appellants and their said late partners, Richard Campbell Bazett and John Farquhar, as such consignees as aforesaid, claimed to be entitled to the said 511 bales of cotton wool so brought into the said docks on board the said ship as aforesaid, by virtue of a bill or bills of lading thereof; and that on 22d of April, 1818, Mr. Charles Cartwright, then Accountant General of the East India Company, received a notice from the Respondent, as the managing owner of the ship *Hero*, claiming for the use of himself and co-owners of the said ship, the freight due in respect of the ship's late voyage from Bengal, amounting to the sum of 5605*l.* 5*s.*, and further stating, that on the 18th of May, 1818, Mr. Charles Cartwright received a notice from the Appellants and their late partners, requesting him to retain the proceeds of the sale of the different goods, and not to pay the same to Mr. Campion until it should have been legally decided to whom such freight was due. That, after making such payments to the Appellants and Respondents respectively as therein mentioned, the sum of 2585*l.* 10*d.* then remained as a balance in the hands of the Plaintiffs, which they were ready and willing to pay to the party entitled to the same; and that the Respondent had commenced an action against the Plaintiffs, &c. The bill prayed that the Defendants might interplead, &c.

The Appellants and their late partners, by their

answer, submitted that they were entitled to have the said sum of money paid over to them under the circumstances and for the reasons therein and herein-after mentioned; and they further said, that some time in November, 1816, the said ship "Hero" was hired or chartered by Mr. John Burton Gooch, then of the city of London, merchant, for a voyage from London to Madeira, and from thence to Madras and Calcutta, in the East Indies, and that a certain charter party of affreightment for the said voyage was made in London on the 18th November, 1816, between the Respondent, of the one part, and the said John Burton Gooch, of the other part; and that thereby, for the considerations therein mentioned, the Respondent chartered the said ship or vessel to the said John Burton Gooch for the said voyage; and that the said John Burton Gooch agreed to pay the said owner, for the freight or hire of the said ship, for the aforesaid voyage, at and after the rate of 14*l.* sterling per ton, with 2*l.* 10*s.* per cent. primage on the amount of the freight, and in lieu of all port and pilotage charges, in manner therein mentioned. The answer then stated, that after John Burton Gooch had hired the said ship for the said voyage, he shipped sundry goods and merchandize on board thereof, and consigned the said ship and merchandize to Messrs. Colvin and Co., of Calcutta, the agents of the Appellants and their said late partners, and directed them either to make a return cargo, or send the ship home from thence on freight, and in either case, to consign the same to the Appellants; and that if the said ship should be sent home by Messrs. Colvin and Co., in freight, then that the proceeds of the

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outward bound investment should be remitted home to the Appellants and their partners, in bills of exchange. They further stated, that the said John Burton Gooch afterwards applied to them to advance him money, which they consented to do, upon having the re-payment thereof, and also of such other monies as the said John Burton Gooch was indebted to them, with interest, secured to them upon his investment in the said ship; and further stating, that they had advanced to the said John Burton Gooch, he consenting that they should hold the proceeds of the said adventure as a security, the sum of 6000*l.* and upwards; that the said Messrs. Colvin and Co. received the said outward cargo, and sold and disposed of the same in India; and that, being unable to procure a full freight home for the said ship on such terms as they deemed for the advantage of the said John Burton Gooch, they, in order to fill up the said ship, invested the net proceeds of the sale thereof, as far as the same would extend, together with other monies of their own, in the purchase of the said 489 bales, and twenty-two half bales of cotton wool, which they caused to be put on board the said ship, consigned to the Appellants and their partners, and that bills of lading for the same were made and signed by the master of the said ship, by which the said cotton wool was to be delivered to the Appellants and their partners, or their assigns, upon payment of freight, which amounted to the sum of 849*l.* 5*s.* 10*d.*

The answer then stated, that, at the request of John Burton Gooch, Messrs. Colvin and Co. advanced considerable sums of money to John Burton Gooch, or on his account, in the purchase and

shipment of the homeward cargo, and in other necessary charges and expenses respecting the adventure in Calcutta, and that, for the re-payment thereof, Messrs. Colvin and Co., having the said cargo and the said bills of exchange which are therein and herein-after mentioned in their hands, were entitled to a lien thereon, subject only to the lien of the Appellants and their said late partners, for the payment of their said debts; and that the said cotton wool and bills of exchange were so consigned and sent by the said Messrs. Colvin and Co. to the Appellants and their said partners, as their agents, and for the purposes of keeping secured to them the payment of their said debt, by their lien upon the said property.

They further stated, that they believed that the said ship was put up by Messrs. Colvin and Co. as a general ship, to take in goods for England; and that goods were accordingly shipped on board the said ship "Hero," and that bills of exchange for the freight thereof were drawn by the several shippers, and delivered by them to the said Messrs. Colvin and Co., and were by them remitted to the Appellants and their said late partners, and that such bills amounted in the whole to the sum of 2,644*l.* 1*s.* 10*d.*; that when the Appellants and their said late partners received the said bills of exchange from the said Messrs. Colvin and Co., and the bills of lading of the said cotton wool, they received notice from them of the lien which they claimed to have thereon, and their right to be paid out of the proceeds thereof what was due to them from the said John Burton Gooch in respect of the matters aforesaid, and in fact that they received such bills of lading

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and bills of exchange, and held the same as the agents of the said Messrs. Colvin and Co., and for the purpose therein and herein-before mentioned; and that before the said adventure in the "Hero" was begun, and some time in June, 1816, the said John Burton Gooch and one Charles Sivrac, then of the city of London, master mariner, had entered into a similar speculation, and that for that purpose the said John Burton Gooch had chartered the ship "Eliza" from Mr. George Faith, and that the said Charles Sivrac had been appointed by the said John Burton Gooch to and went out to India in the command of her, and that the Appellants and their said late partners at their request advanced them large sums of money upon the like security of goods, purchased by them in this country and put on board the said ship "Eliza," and sent out to them in Calcutta, consigned to the said Messrs. Colvin and Co. by them; that the said Messrs. Colvin and Co. sold the same, and with the proceeds thereof and their own monies purchased a large quantity of cotton wool, which they put on board the said ship "Eliza," and sent, consigned to the Appellants and their said late partners, in the same manner as in the case of the "Hero," and that the said ship "Eliza" having arrived in this country after the said John Burton Gooch and Charles Sivrac had become insolvent, the said George Faith claimed to have a lien on the proceeds of the sale of the said cotton wool which had been sold by the Appellants, and that their right to such lien was then in dispute between the Appellants and their said late partners, and the said George Faith, upon a bill of interpleader in the Court of Exchequer.



They further stated, that they the Appellants believed that the sum of 500*l.*, which it was agreed by the said charter-party of the "Hero" should be paid to the Respondent at the time therein mentioned, was paid to him at or about that time and before the arrival of the said ship the "Hero," from the river Hooghly, and that the sum of 849*l.* 5*s.* 10*d.* herein-before mentioned, the freight upon the said cotton wool, had also been paid to him out of the proceeds of the sale thereof by the said Plaintiffs; and that they the Appellants and their said late partners consented to such payment, believing that the balance of the said sum 5434*l.* 6*s.* 8*d.*, which would remain in the hands of the said Plaintiffs after payment of the said sum of 849*l.* 5*s.* 10*d.* to the Respondent and 2000*l.* to themselves, would be fully sufficient for securing the re-payment to them of the balance which would be eventually due to them and the said Messrs. Colvin and Co. in respect of the transactions aforesaid; and, that for the reasons aforesaid, and also by reason of the special agreement contained in the charter-party for payment of the said freight by bills of exchange in manner therein mentioned, the Appellants and their said late partners were advised that the said Respondent had not any lien on the said return cargo, or any right to hold or detain the same for payment of any sum of money which might be due to him for the hire of the said ship for the said voyage, and that he had not then any lien upon or any right to the said sum of 2585*l.* 0*s.* 10*d.*, part of the proceeds of the sale of the said cotton wool so received by the Plaintiffs. They submitted and insisted that if the Re-

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spondent had any lien whatever, he had not any lien on the said cotton wool, or any claim upon the proceeds of the sale thereof beyond the sum of 849*l.* 5*s.* 10*d.*, which had been paid to him for the freight thereof, the said cotton wool being, as they submitted, the property of the Appellants and their late partners, in order to secure the re-payment of their advances to the said John Burton Gooch and the money owing to them from him as herein-before mentioned; and also the balance due from the said John Burton Gooch and Charles Sivrac to the said Messrs. Colvin and Co. as aforesaid; and that there was due to the Appellants and their late partners, from the said John Burton Gooch, in respect of their advances to himself the sum of 1900*l.* and upwards, and in respect of their other advances the sum of 600*l.* and upwards, amounting together to the sum of 2500*l.* and upwards, for payment of which they claimed to have a lien on the said sum of 2585*l.* 0*s.* 10*d.*, &c. They further stated, that they believed that upon the accounts of the said John Burton Gooch and Charles Sivrac with the said Messrs. Colvin and Co. there was due to the said Messrs. Colvin and Co. a very large sum of money, and upwards of the sum of 1290*l.* for which they claimed to have a lien on the said several sums of money; and that the said John Burton Gooch had become a bankrupt, and that a commission of bankruptcy had been issued and was then in prosecution against him, and that Edwin Saville, Thomas Milroy, and Thomas Farmer had been chosen and were then the assignees of his estate and effects under the said commission, and submitted, under the cir-

cumstances aforesaid, whether the assignees should not be parties to the suit.

The Respondent by his answer said, that he did under the charter-party of the said ship or vessel claim to be entitled to receive out of the proceeds of the said cotton wool belonging to the said John Burton Gooch, so sold by the Plaintiffs as aforesaid, the sum of 1746*l.* 13*s.* 8*d.*, as the balance due under the said charter-party, together with the interest thereon, from the time that such balance became due, according to the terms of the said charter-party, together with all the costs which he had incurred and might thereafter incur, both at law or in equity, in respect of such his demand.

The Plaintiffs afterwards amended their bill, and made Edwin Saville, Thomas Millroy, and Thomas Farmer, the assignees of the estate of John Burton Gooch, under the commission of bankrupt, parties defendants thereto; and the last named Defendants appeared and put in an answer and disclaimer to the bill, and thereby disclaimed all interest in the matter; and the bill was afterwards, by order, dismissed as against them.

The cause was heard before the Vice-Chancellor on the 17th of April, 1826, when his Honor decreed, as follows, *viz.*: That the parties should proceed to a trial at law in his Majesty's Court of Common Pleas at Westminster, on the following issue, that is to say, *Whether the Respondent and his partners, or any of them, as owners of the ship "Hero," in the pleadings mentioned, had a lien on the 489 bales of cotton wool, in the pleadings mentioned, for freight beyond the freight due in respect of the said cotton wool under the bills of lading thereof; and in such issue the Respondent was to*

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be plaintiff at law, and the Appellants and their partners were to be the defendants at law.

John Farquhar died on the 6th of July, 1826, but all his interest in the matters survived to the the Appellants and Richard Campbell Bazett, deceased.

The issue was tried at Guildhall on the 24th of April, 1827, before the then Lord Chief Justice of the Common Pleas, and a verdict was found for the Plaintiff therein; but an order was made by the Vice-Chancellor, on the 26th of July, 1827, upon the motion of the Appellants and their late partner, Richard Campbell Bazett, whereby it was ordered that the parties should proceed to a new trial of the issue.

By another order made in the cause, on the 8th of December, 1827, it was ordered, that the Appellants and Richard Campbell Bazett, deceased, should be at liberty to sue out one or more commission or commissions for the examination of witnesses in this cause in Calcutta in the East Indies, returnable without delay; and it was further ordered, that the Clerk in Court of the Respondents should, within four days after notice thereof given, join and strike commissioners' names with the Clerk in Court of the Appellants and Richard Campbell Bazett, or in default thereof, the Appellants were to be at liberty to sue out such commission, directed to their own commissioners; and in case the Respondent should join in such commission or commissions he was to be at liberty to take out a duplicate or duplicates of such commission or commissions if he should think fit; and in such case fourteen days' notice of the execution of such commission or commissions should be

deemed good notice to the Appellants; and it was further ordered, that the depositions to be taken under and by virtue of such commission were to be read in evidence upon the trial of the issue directed by the decree made on the hearing of the cause, on the 17th of April, 1826, and the trial of the issue was to be stayed until the return of the commission.

In pursuance of the order, the Appellants and Richard Campbell Bazett sent out a commission to Calcutta for the examination of witnesses, and the Respondent joined therein, and took a duplicate thereof, which he also sent out to Calcutta, but the commission was not returned at the date of the proceeding in the Court below, which was the subject of appeal.

Upon the ground of the delay in the return of the commission, the Respondent applied, on the 30th of July, 1831, to the Vice-Chancellor, to discharge the order for a new trial, and so much of the order for a commission as stayed the trial; and the Vice-Chancellor ordered, that the order made in this cause on the 26th of July, 1827, whereby it was ordered that the parties should proceed to a new trial of the issue in this cause, and also the order made in the same cause, bearing date the 8th of December, 1827, so far as directed the trial of the cause to be stayed, should be discharged.

The last-mentioned order of the 30th of July was drawn up and served upon the Appellants and Richard Campbell Bazett in the month of November, 1831, and the Appellants thereupon immediately gave notice to the Respondent that they

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should move the Court before the Lord Chancellor, on the 25th of November, 1831, that the said order might be discharged.

The motion was accordingly made before the Lord Chancellor on the 8th of December 1831, and affidavits were filed by the Appellants in support thereof, and in opposition to the motion of the Respondent, upon which the order was made, and an affidavit of the Respondent was read, by which affidavits the Appellants submitted that the alleged delay in the said proceedings was satisfactorily accounted for, and that under the circumstances of the case, and regard being had to the fact, that the question in dispute between the Appellants and the Respondent had never been tried, nor their respective rights to the fund in question ascertained, that the order made by the Vice-Chancellor ought not to have been made; but the Lord Chancellor, on the 18th of January, 1832, ordered that the motion should be refused with costs.

The cause having been set down to be heard on the equity reserved on the footing of the verdict, was heard before the Master of the Rolls on the 15th of February, 1832, when it was ordered and decreed that it should be referred to the Master in rotation, to take an account of what was due to the Respondent under and by virtue of the charter-party in the pleadings mentioned; and it was further ordered, that the Master should compute interest thereon after the rate of 5 per cent. per annum, from the 1st of September, 1818, being four months from the day of the arrival of the ship *Hero* in the river Thames, and being the time

when the bills of exchange to have been drawn for the amount would have been due; and it was further ordered, that the sum of *3251*l.* 0*s.* 10*d.**, 3 per cent. consolidated annuities, standing in the name of the Accountant-General of this Court, in trust in the cause, should be sold with his privity, and one of the cashiers of the Bank of England was to have notice to attend and receive the money to arise by such sale, and upon receipt was to pay the same into the Bank, with the privity of the Accountant-General, to the credit of this cause; and it was further ordered, that what the Master should find due to the Respondent be paid to him out of the money to arise by the sale, and the sum of *48*l.* 15*s.* 4*d.**, cash in the Bank on the credit of this cause; and in case the money arising from the sale, and such cash, should be insufficient to pay the amount found due, then it was further ordered, that the whole of the bank annuities, and the sum of cash, should be paid to the Respondent; and it was further ordered, that the deficiency should be paid by the Appellants and Richard Campbell Bazett, out of the sum of *2000*l.** received by them out of the proceeds of the sale of the cotton wool in the pleadings mentioned.

Richard Campbell Bazett died on the 31st of December, 1832, but all his interest in the matters survived to the Appellants.

The appeal was against the orders of the 30th of July, 1831, and of the 18th of January, 1832, and the decree or order on further directions of the 15th of February, 1832.

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For the Appellants, Sir *W. Horne* and Serjeant *Taddy*.

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The suit in Chancery was an interpleading suit, and the fund in dispute had been brought into Court, and it was incumbent on the Court to have the rights of the litigating parties judicially ascertained before it gave the fund to either of them: By the decree made on the hearing of the cause, on the 17th of April, 1826, the Court did in effect judicially declare that a trial at law was necessary to ascertain the rights of the parties, and inform the conscience of the Court; and the justice of that decree has never been impugned: the issue which had been directed by that decree had not been properly tried; and the learned judge by whom the new trial was ordered, declared that the trial had not answered the purpose for which it was directed, and that the Court could not act upon the verdict: the justice of his order has never been disputed. The only ground upon which it has been disturbed, is imputed delay on the part of the Appellants in proceeding to execute a commission for the examination of their witnesses in India; the Appellants submit that such delay is sufficiently accounted for, and even if it be not, yet the Respondent had taken a duplicate of such commission, and was party to the delay, and such delay alone cannot entitle the Court to proceed in the matter without an inquiry; and the order for a new trial and commission ought not to have been discharged, unless at the same time the Court had given some other proper directions for inquiring into and ascertaining the rights of the parties to the fund in question; and the order of the Vice-Chancellor of the 30th of July, 1831, and the order of the Lord Chancellor of the 18th of January, 1832, were consequently erroneous.



The decree made on further directions on the 15th of February, 1832, is made upon the footing of the verdict upon the trial, which had not satisfied the purposes of the issue, and had been judicially declared to be unsatisfactory and insufficient for the Court to act upon; and such decree is unjust and ought to be reversed. Even if the Respondent were entitled to a lien, as against the charterer, for the freight according to the charter-party, yet the cotton wool did not, nor did any part of it, belong to the charterer, and was not liable to the payment of any greater sum for freight than the sum of 849*l.* 5*s.* 10*d.* according to the bills of lading, and which sum had been paid to the Respondent.

The decree of the 15th of February, 1832, in effect, gives to the Respondent a lien upon the cotton wool for primage and demurrage, which he was not entitled to at law; and he was not entitled at law to any lien on the goods, or the produce of the sale thereof, for interest. The suit being merely an interpleading suit, the Court had no jurisdiction to do more in the cause than to decide to which of the litigating parties the sum of 2585*l.* 0*s.* 10*d.* mentioned in the pleadings, and brought into court in the cause, did of right belong; whereas the decree of the 15th of February, 1832, orders that the deficiency of the fund in court to satisfy what is due to the Respondent according to that decree, shall be paid by the Appellants and their partner, out of the 2000*l.* therein mentioned, which formed no part of the fund properly the subject of the interpleader. The relief given to the Respondent is beyond the claim made by his answer upon

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the fund in question; and the decree is therefore erroneous.

For the Respondents, Mr. *Bickersteth* and Mr. *Spence*.

The issue directed by the decree of the 17th of April, 1827, to be tried between the Appellants and the Respondent, was fairly and properly tried, and each of the parties fully went into their evidence, and on that evidence the issue was found for the Respondent, under the direction of the learned Judge before whom the same was tried. Assuming a new trial of the issue to have been properly directed by the order of the 26th of July, 1827, yet the Appellants, by their delay in sending out the said commission, and by neglecting to execute and return the same, unnecessarily and improperly delayed the trial of the said issue, and on the hearing of the motions on which the said orders of the 30th of July, 1831, and the 18th of January, 1832, were respectively made, the Appellants did not satisfactorily account for the delay, and the commission is not even yet returned.

Sir *William Horne* commenced his reply, and was commenting upon the order on further directions, when the Lord Chancellor interposed. —

The *Lord Chancellor*. I will tell you how the thing strikes me, and if you are satisfied, I need go no farther, and if you are not satisfied I will hear you. The order upon further directions being consequent on the order of the Vice-Chancellor discharging the orders of Sir Anthony Hart, his predecessor, for a new trial, and discharging so much of the order for the commission as related to the staying of the new trial while the commission should be proceeded with, was heard be-

fore me by appeal; and after much consideration, argument, and consultation upon the proceedings that took place in the Common Pleas, I decided upon confirming the order of the Vice-Chancellor; but what I should now recommend, — notwithstanding my previous decision, if this order affirming the order of his Honor the Vice-Chancellor is reversed, and Sir Anthony Hart's order shall stand, so far as relates to the new trial, — is to say nothing about the order as to further directions; if there should be a new trial, we are not in a state sufficiently forward to deal with the question, whether the further directions shall or shall not stand: that question must be suspended, and nothing can be done as to the farther directions till the new trial shall be had. Therefore, it is quite immaterial now to go further than to restore the order granting a new trial.

My doubts have been so greatly increased upon the propriety of the judgment which I gave, (though upon great consideration) as to whether justice was done to the parties, that after having had my memory refreshed from that which has transpired in the argument at the bar of what took place, and the manner in which that cause was conducted on all hands, and the scanty evidence that there was, and the result on the whole of that trial, which Sir Anthony Hart thought so very unsatisfactory, that he directed a new trial of that issue — taking all these things into consideration I am not prepared to advise your Lordships to affirm the order to the extent of a total affirmance.

Then the question arises, whether I shall go so far as to reverse the whole of that order, accompanying the reversal with an order for a new

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trial. Now I am strongly confirmed in my former conclusion as to the very great laches in the two years from 1827 to 1829 unaccounted for, and imputable to the party obtaining the order for the commission in not having that commission executed, the consequence of which was that the opposite commission, the correlative commission to cross-examine witnesses, could not be executed on the part of the Respondents. The argument upon this is still further confirmed by what has passed since the power ended of examining witnesses: because, although the order for examining the witnesses had been rescinded, in the interval an application might have been made, in some shape or other, to avoid the very great delay which has taken place. We are now in 1834, and the commission was ordered in 1827, and during the whole period they might have found means to avoid the delay. I do not see what sinister motives the parties could have in the laches: it might be owing to mere carelessness, or to that which is the cause of the worst sort of laches, when parties are in possession. At all events the parties must suffer the consequences of their laches, at least the party injured must, if possible, be saved from the effect of the delay.

Upon the whole, therefore, I am of opinion that if I should advise your Lordships to reverse the order which I made in the Court of Chancery discharging Sir Anthony Hart's order, I should be acting rightly, that is to say, upon the principle not to allow the laches to operate beyond the extent to which it ought to be allowed to affect the party to whom it is imputed. The consequence of that would be, that the order would

stand so far as regards the discharging the commission, and the discharging the order for staying the trial; but it would be reversed so far as regards the discharging the order of Sir Anthony Hart for the new trial.

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The *Lord Chancellor*. — The case of *Colvin v. Campion* was also an appeal from my decision, a decision by which I had discharged the order of his Honor the Vice-Chancellor, that is to say, of Sir Anthony Hart, but affirmed the order of his Honor the present Vice-Chancellor, which order discharged Sir Anthony Hart's order. 12th Aug. 1834.

The order of Sir Anthony Hart consists of three parts: the first is the grant of a new trial of an issue which had been unsatisfactorily tried, in the opinion of that very learned and experienced Judge in the Court of Common Pleas, before Lord Wynford then Chief Justice. The second was an order granting a commission to examine witnesses in the East Indies; and the third an order staying the proceedings upon the new trial till the execution of the commission. All three orders had been discharged by the reversal of his Honor's order; and that judgment I affirmed after full argument and much consideration.

Upon the further reflection which I have given to the case, and for the reasons I stated at large upon the argument before your Lordships, I have been induced to come to the conclusion, that both I and the Vice-Chancellor were wrong in discharging the whole of the order of Sir Anthony Hart.

For the reasons, which I then assigned, and which I need not repeat, I move your Lordships to reverse so much of the order of the Court below

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as discharged the order of Sir Anthony Hart, granting a new trial of the issue but to reverse no more — retaining, therefore, and affirming the rest of the order of the Court of Chancery which affirmed the order of his Honor the present Vice-Chancellor. The result will be that a new trial may be had, by reversing the order, discharging Sir Anthony Hart's order, and restoring that order to its pristine force, so far as it directs a new trial. But there will be a reversal of the order of Sir Anthony Hart which granted a commission to examine witnesses in the East Indies, and also of that part staying the new trial of the issue till the execution of that commission. The laches of the party clearly justified that part of the present Vice-Chancellor's order, and the laches of the party, therefore, clearly justified me in affirming that part of the order discharging Sir Anthony Hart's order; but it appears to me, for the reasons assigned upon the former occasion, that we ought not to go beyond that particular matter to which it applied, the damage resulting from it to the other party, — I mean the delay, totally unaccounted for, in executing the commission for the examination of witnesses abroad; that ought not to affect the new trial of an issue in a case where the conscience of the Court was not sufficiently informed.

There will, therefore, be a new trial, but no commission and no stay of the proceedings. I propose to add to this, what I stated to the counsel at the bar, a power to either party to use the Judge's notes upon the former trial of the evidence of any of the witnesses who may be dead or beyond seas, when the new trial shall take place; but only in case proper admissions shall not have

been entered into by the other party; and, to prevent more laches on the part of the Plaintiff, I propose to give leave to the Defendant to apply to have the 2000*l.* paid into Court in case of any unnecessary delay in proceeding to the new trial. Of course there will be no costs.

Judgment below in part reversed.

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*Die Martis, 12° Augusti, 1834.*

It is ordered and adjudged by the Lords Spiritual and Temporal in parliament assembled, that the order of the Court of Chancery on the 18th of January, 1832, by which the motion made on the part of the said Appellants was dismissed with costs, be, and the same is hereby reversed: And it is declared, that so much of the said order of the said Court of the 30th of July, 1831, as discharged the former order made in this cause, bearing date the 8th of December, 1827, whereby it was ordered that the said parties should proceed to a new trial of the issue in this cause ought to be discharged; and it is therefore ordered and adjudged that the said parties do proceed forthwith to a new trial of the said issue: And it is further ordered and adjudged that all other parts of the said order of the 30th of July, 1831, be, and the same are hereby affirmed: And it is further ordered that all parties be at liberty to apply to the Court of Chancery for leave to use the Judge's notes of the evidence give upon the former trial, in case any of the witnesses, examined on the former trial, shall be dead or abroad. And it is further ordered, that the said Respondent have liberty to apply to the said Court of Chancery for payment into Court of the said

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sum of 2000*l.*, or any part thereof, in case the said Appellants shall delay proceeding to such new trial. And it is further ordered, that the said decree or order of the said Court on further directions of the 15th of February, 1832, be, and the same is hereby reversed.

W. COURTENAY,  
*Dep. Cler. Parliamentor.*



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## ENGLAND.

(COURT OF CHANCERY.)

LAURA TOLLEMACHE, commonly  
called LADY LAURA TOLLE-  
MACHE - - - - - } *Appellant.*

The Right Honourable GEORGE  
WILLIAM EARL of COVENTRY,  
and MARY COUNTESS of Co-  
ventry, his Wife - - - - - } *Respondents.*

V. by his will bequeathed to trustees all his household goods, furniture, pictures, books, linen, &c. upon trust, to permit his wife to have the use of them during her life, and upon her death, to permit his son A. B. to have the use of the same goods &c. for his life, and upon the decease of the survivor of his wife and son should be possessed, &c. in trust for such person as should *from time to time* be Lord V., it being his will that the goods, &c. after the decease of his wife, should from time to time go and be held and enjoyed with the title of the family as far as the rules of law and equity would permit: Held, that the limitation over was void as being too remote, and that the estate vested absolutely in the eldest son of A. B., grandson of the testator, who was living at the date of his death.

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**V**ERE, Lord Vere, by his last will and testament, in writing, bearing date the 15th of March, 1781, gave and bequeathed the household goods, &c., therein mentioned in the following words:—

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“ I give and bequeath unto James Earl of Aber-  
 “ corn, Robert Drummond, and Thomas Walley  
 “ Partington, all the household goods, furniture,  
 “ pictures, books, linen, china, and glasses, which  
 “ shall at the time of my decease be at my mansion  
 “ house of Hanworth, in the county of Middlesex,  
 “ or in any of the offices belonging to the same,  
 “ and also all such silver and gilt plate as I shall  
 “ be possessed of at the time of my decease,  
 “ whether the same shall be at Hanworth or in  
 “ London, and in both places respectively, upon  
 “ this special trust and confidence, nevertheless,  
 “ that they the said James Earl of Abercorn, Robert  
 “ Drummond, and Thomas Walley Partington, and  
 “ the survivors and survivor of them, and the exe-  
 “ cutors and administrators of such survivor do  
 “ and shall permit and suffer my said wife, Mary  
 “ Lady Vere, to have the use and enjoyment of the  
 “ same goods, furniture, pictures, books, linen,  
 “ china, glasses, and plate, for and during the term  
 “ of her natural life, and from and immediately  
 “ after her decease, upon trust, to permit and suffer  
 “ my son Aubrey Beauclerk to have the use and  
 “ enjoyment of the same goods, furniture, pictures,  
 “ books, linen, china, glasses, and plate, for and  
 “ during the term of his natural life, and from and  
 “ immediately after the decease of the survivor of my  
 “ said wife and son, it is my will, and I do hereby  
 “ direct that they my said trustees, and the survivors  
 “ and survivor of them, and the executors and admi-  
 “ nistrators of such survivor, do and shall be pos-  
 “ sessed of the same goods, furniture, pictures,  
 “ books, linen, china, glasses, and plate, in trust  
 “ for such person as shall from time to time be  
 “ Lord Vere ; it being my will and intention and

“ my sole motive for making this disposition, that  
 “ the same goods, furniture, pictures, books, linen,  
 “ china, glasses, and plate, shall, after the decease  
 “ of my said wife, from time to time go and be  
 “ held and enjoyed with the title of the family,  
 “ as far as the rules of law or equity will permit.”

The testator by his will also gave and bequeathed unto James Earl of Abercorn, Robert Drummond, and Thomas Walley Partington, their heirs, executors, and administrators, all such his principal monies, as at the time of his decease should be invested and placed out on real, personal, government, or other securities, in India bonds, navy bills, or in any of the public or parliamentary funds, upon trust, after his decease, to make sale of such of the said securities and funds as were in their nature saleable, and to call in the monies placed out upon such securities and funds as were not saleable, and by and out of the monies to arise thereby to pay certain sums of money in the said will mentioned ; and as to the residue of the monies so to be produced as aforesaid, the said testator directed that the said James Earl of Abercorn, Robert Drummond, and Thomas Walley Partington, their executors, administrators, and assigns, should lay out and invest the same in the purchase of freehold or copyhold lands, tenements, or hereditaments, in fee simple, and convey, limit, surrender and assure the same to the use of his the said testator's wife, Lady Mary Vere, for her life, without impeachment of waste, with remainder, to the use of trustees in such settlement to be named, in trust, to preserve contingent remainders, with remainder, to the use of the said James Earl of Abercorn, Robert Drummond, and Thomas Walley

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Partington, for a term of 100 years, upon certain trusts therein declared, and long since performed and satisfied, with remainder, after the determination of the said term, to the use of his the said testator's son, Aubrey Beauclerk, and his assigns, for life, without impeachment of waste, with remainder, to the use of the said trustees, in trust, to preserve contingent remainders, with remainder to his the said testator's grandson, Aubrey Beauclerk, the eldest son of his said son, Aubrey Beauclerk, for his life, without impeachment of waste, with remainder to trustees to preserve contingent remainders, with remainder, to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the body of his said grandson, Aubrey Beauclerk, severally, successively, and in remainder one after the other in tail male, with remainder, to the use of his the said testator's grandson, William Beauclerk, second son of his the said testator's son, Aubrey Beauclerk, and his assigns, for and during the term of his natural life, without impeachment of waste, with remainder to trustees, to preserve contingent remainders, with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the body of his said grandson, William Beauclerk, severally and successively and in remainder one after the other, in tail male, with divers remainders over. And the testator appointed his wife, Lady Mary Vere, and Lord Charles Spencer, his sole executors.

The testator died in 1781, leaving his widow, Lady Mary Vere, and his son, Aubrey Beauclerk, and his two grandsons, Aubrey Beauclerk and

William Beauclerk, sons of Aubrey Beauclerk, and all of them in his will named, him surviving.

Lady Mary Vere, and Lord Charles Spencer, the executors, proved the will, and assigned the furniture, pictures, books, and plate, and other things, to James Earl of Abercorn, Robert Drummond, and Thomas Walley Partington, the trustees thereof in the will named.

Robert Drummond survived his co-trustees, and died about the year 1806, having appointed his sons, Andrew Berkeley Drummond, John Drummond, and Charles Drummond, his executors, who duly proved his will, and thereby became trustees of the furniture, pictures, books, and plate, and other things.

Upon the death of the testator, Vere Lord Vere, the title of Lord Vere descended upon his son, Aubrey Beauclerk, afterwards Duke of St. Albans, who survived Lady Mary Vere, his mother, and died in the month of February, 1802; and upon his death, the title of Lord Vere descended upon Aubrey Beauclerk, his eldest son, and one of the grandsons in the testator's will, named, who died in the month of August, 1815; and upon his death, the title of Lord Vere descended upon Aubrey, his only son, an infant four months' old, who thereupon became Aubrey Lord Vere, and Duke of St. Albans.

Upon the death of the testator, the title of Lord Vere descended upon his son Aubrey Beauclerk, who was second Lord Vere, and afterwards became fourth Duke of Saint Albans. He died in February, 1802, leaving Aubrey his eldest son, (who thereupon became third Lord Vere, and fifth Duke of Saint Albans,) William, his second son,

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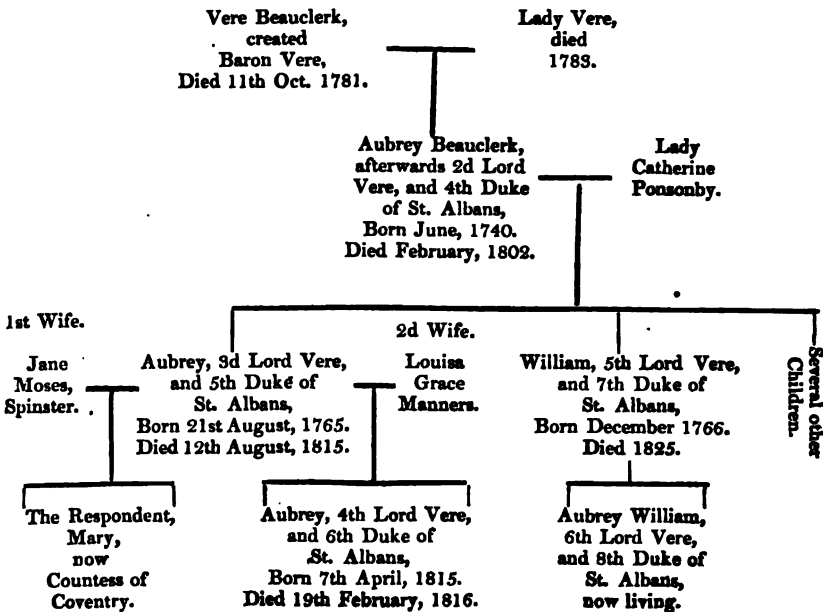
  
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and other children. Aubrey, third Lord Vere, and fifth Duke of Saint Albans, intermarried first, with Jane Moses, spinster, by whom he had issue the Respondent, Mary, Countess of Coventry; and secondly, with Louisa Grace Manners, spinster, by whom he had issue Aubrey, who survived his father only a few months, and died an infant in February, 1816. Upon the death of the infant, William, his uncle, became fourth Lord Vere, and seventh Duke of Saint Albans; and upon his death in 1825, Aubrey William, now Duke of Saint Albans, succeeded to both his titles.

Aubrey, the second Lord, and Aubrey, the third Lord Vere, were both living at the death of Vere Lord Vere, the testator. \*

\* PEDIGREE.



Mary Lady Vere, died in the year 1788. The chattels bequeathed by Lord Vere's will were enjoyed by Lady Vere during her life; and, after her death, by Aubrey the son, and Aubrey the grandson in succession, during their lives. Aubrey, third Lord Vere, and fifth Duke of Saint Albans, by his will, dated the 18th of July, 1814, (afterwards duly proved,) gave the residue of his personal estate to his wife, Louisa Grace, Duchess of Saint Albans, and appointed her sole executrix; the duke died in August, 1815, leaving the Duchess surviving him, and leaving his two children above-named, *viz.* Lady Coventry, his only child by his first wife, and Aubrey, who then became Lord Vere and Duke of Saint Albans, his only child by his second wife.

After the death of Aubrey, the third lord and fifth duke, a bill was filed in the Court of Chancery by Aubrey his infant son, then fourth Lord Vere and sixth Duke of Saint Albans (by his next friend), against Louisa Grace, Duchess of Saint Albans, his mother, and against Sir Gilbert Heathcote, Baronet, James Ramsay Cuthbert, and John Manners, Esquires, the then trustees of the settlement made upon the marriage of Aubrey, the third Lord Vere, with his second wife, and also against the said Andrew Berkeley Drummond, by which the infant duke claimed to be absolutely entitled to the furniture, pictures, &c. bequeathed by the will of Vere, Lord Vere, as aforesaid, and prayed that an account thereof might be taken under the decree and direction of the Court. The bill was afterwards amended, by striking out the names of the said defendants Sir Gilbert Heathcote, James Ramsay Cuthbert, and John Manners, and adding

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the names of the said John Drummond and Charles Drummond, as Defendants.

After all the Defendants to the original and amended bill had appeared; but before they had put in their answers, the Plaintiff died an infant, aged ten months.

The Defendant, Louisa Grace Duchess of Saint Albans, survived the infant Plaintiff, and died, having by her will, dated the 28th of November, 1815, bequeathed the residue of her personal estate to her sister Lady Laura Tollemache (the Appellant), and appointed her sole executrix. This will Lady Laura proved in the prerogative court of the Archbishop of Canterbury, and also took out letters of administration, to Aubrey the third lord and fifth duke, with his will annexed.

In Trinity Term, in the year 1818, George William Coventry, then Viscount Deerhurst, and afterwards Earl of Coventry, and Mary, Countess of Coventry, then Lady Mary Deerhurst, his wife, (who had taken out letters of administration of the goods and chattels of the infant duke, her half-brother,) filed their bill of revivor and supplement against Sir Gilbert Heathcote, James Ramsay Cuthbert, and John Manners (who were afterwards struck out by amendment as parties Defendants thereto), and also against Andrew Berkeley Drummond, John Drummond, and Charles Drummond (the Appellant), Lady Laura Tollemache, and William then Duke of Saint Albans, claiming to be absolutely entitled in right of the Countess (as representative of the infant duke), to the furniture, plate, pictures, &c. mentioned in Vere, Lord Vere's will.

William Duke of Saint Albans, by his answer to



the bill of revivor and supplement, claimed as tenant in tail in possession of the Barony of Vere, to be entitled under and by virtue of Vere, Lord Vere's will to the goods, furniture, pictures, &c.

Lady Laura Tollemache by her answer stated, that in the year 1795, the household furniture, linen, china, and glass, and some of the pictures bequeathed by the will of Lord Vere, had been sold, and the proceeds thereof invested in securities, bearing interest, and which then amounted to 928*l.* 6*s.* 5*d.* 4 per cent. annuities; and that some of the said pictures had been destroyed by a fire which happened at Hanworth house, the residence of Aubrey (the son of Lord Vere), and afterwards Duke of St. Albans: And submitted that the late infant Plaintiff, Aubrey, Duke of St. Albans, did not, upon his father's death, become absolutely entitled to the said chattels, but that the same vested in his father, the preceding duke (being the third lord), as his absolute property, and then belonged to (the Appellant) Lady Laura, as his personal representative.

The cause was heard before the Vice Chancellor, in Michaelmas Term, 1820, when his honour declared, that the Plaintiff Lady Mary Deerehurst (as administratrix of the late infant Duke of Saint Albans), was absolutely entitled to the said goods, furniture, pictures, &c. directed by Lord Vere's will to go and be held and enjoyed with the title of the family, and decreed certain accounts to be taken.

Against so much of the decree, as declared that the Plaintiff, Lady Mary Deerehurst (as administratrix of the said infant Duke of Saint Albans) was absolutely entitled to the goods, furniture, pictures, &c. Lady Laura Tollemache appealed to the Lord

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Chancellor. The appeal was heard before Lord Eldon, and subsequently before Lord Lyndhurst, who, on the 22d of November, 1830, gave judgment on the Appeal, and ordered that the decree of the 27th of November, 1820, should be affirmed.

From this decree Lady Laura Tollemache appealed to the House of Lords.

For the Appellant, the *Solicitor General* and Mr. Preston.

It was the apparent intent of the testator to create successive life-estates, which by law cannot take effect. Admitting, for argument, that this might be construed an executory trust, a succession cannot be engrafted on the issue of a person unborn as purchasers. A gift to a class of person not ascertainable, until the period at which the interest is to vest is too remote. *Procter v. The Bishop of Bath and Wells* \*, *Jee v. Lord Audley* †, *Robinson v. Leake*. ‡ The doctrine of *cy-pres* as in *Humberstone v. Humberstone* § has no application. The will must be considered with reference to a settlement at the period of its execution. It was uncertain whether any person in being would ever become Lord Vere. The grandson became Lord Vere, not because he was in being at the date of the will; but by the accident of subsequent events. It was not certain that he would be the person to take within the time prescribed by the rules of law. The gift is to a class, and by a description which those who claim under the grandson, might or might not answer. Here is no gift to any of them personally. If the Court could have construed this as an executory trust by the settlement,

\* H. Black. 358.

† 2 Meriv. 363.

‡ 1 Cox, 342.

§ 1 P. Wms. 332.

the property must have been limited to Lady Vere for life, remainder to the eldest son for life, remainder to the next Lord Vere after his death, and the absolute interest must have vested in that person.

A gift for life to a person in *esse* standing alone can never be too remote, *Cotton v. King*\* : but a life-estate may be void as the first of a series of perpetuities, *Barlow v. Salter*.† If Aubrey, Lord Vere, grandson of the testator, had been named as the taker of the life-estate, the limitation over might have been valid ; but neither he nor any person at the death of the testator could be ascertained as the taker of that estate. Events which have happened since could have no effect in directing the limitation of the settlement, if the Court would construe the trust as executory. But this is an executed trust, a perfect gift of the full ownership. No opening is left to mould the limitations according to any presumable intention ; and the Court must act upon the words according to their legal construction.‡ Here the gift is not to the person of the grandson, but to the class of Lords Vere for the time being. He might not have been Lord Vere at the period when the limitation was to vest. The accident of his being so, does not remedy the defect in the constitution of the limitation, its remoteness. The rule of law requires the certainty of vesting within the time prescribed.

A gift to a class is of necessity future, and, to be valid, all who can take must be within the

\* 2 P. W. 108.

† 17 Ves. 482.

‡ See *Foley v. Burnell*, 1 B. C. C. 274. *Vaughan v. Burslem*, 3 B. C. C. 101.

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time and limits of the rule. The House sitting as a court of justice cannot make a new will to model the gift. This in effect is done by the decree of the Vice-Chancellor, which is founded upon the state of facts as they stood at the hearing, not as they were at the time of the devise. That decree proceeds upon fallacies. The trust undoubtedly is not executory, and yet there is no "*direct gift*" as the Vice-Chancellor supposes. He says, that by the rules of law and equity "every person living at the death of the testator who should become Lord Vere might be limited to the use and enjoyment only."\* But in this proposition he assumes that to be a certainty which is only a contingency, namely, that such person will necessarily become Lord Vere. Upon any other construction of his words, the proposition is untrue. He follows up this general proposition by the particular instance of the limitation which he supposes to be in question, namely, that "the son and grandson of the testator being alive at his death, were both limited to the use and enjoyment only." But there is nothing in the will to warrant this assumption. It supposes the grandson to be described as Lord Vere in the will. The judgment is directly contrary to *Hayes v. Hayes*†, and all the authorities. If it is right, all the cases upon heir-looms are wrong. The words in the same will are construed to give to one person an estate for life, and to another the absolute property.

By the attempt to do justice by giving effect to the particular intention in wills, the law has been so unsettled, that no man knows what the

\* 5 Mad. 277.

† 4 Russ. 311.

law is, and the judges now regret that they have not adhered more rigidly to the settled rules of construction. A limitation to the unborn issue of unborn issue, as far as the rules of law and equity will permit, would be merely void, and the words of qualification superadded would be mere surplusage having no effect. According to the Respondent's construction, the course of enjoyment under the limitations includes the two lives named in the will, then some person unascertained, who at the expiration of those lives should happen to be Lord Vere for a life-estate, and then another person to take in remainder absolutely. The uncertainty who would be Lord Vere at the period of vesting destroys the limitation in like manner as a gift to a person not in being when he should take holy orders. *Procter v. Bishop of Bath and Wells*. The fact of his taking orders would not bring the limitation within the rule of perpetuity, and being void in its creation, the gift cannot be modified by construction so as to establish it to the extent to which it might originally have been carried. *Lord Southampton v. Marquis of Hertford*.\* If the property vests in the grandson contrary to the intent of the testator; it is because he has attempted a limitation which is illegal, and the rule of law provides against the intent. If the possessor of a title has an estate of inheritance, the property question would vest in the third Lord Vere absolutely. But if a title is to be considered as a succession of life-estates, then a testator cannot limit property to go in perpetuity to each successive lord for life.

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\* 2 Ves. &amp; Bea. 54.

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of the Rolls (Sir J. Leach). It turns upon a question of novelty and great difficulty in the construction of a will. It is the will of Lord Vere, who died in 1781. Thereby he gives certain chattels to trustees, to permit his wife and son successively to have the use and enjoyment of them, for their respective lives. They are named in the will, and so far all is plain sailing. But in the subsequent limitations without giving life-estates in or the use of these chattels to any person or series of persons in *esse* by name, by which means he might legally have limited and secured the enjoyment to their unborn issue to a certain extent, he thought fit to adopt a course intending to go to the utmost limits of the doctrine of perpetuity. To effect this purpose, he willed that, after the death of the survivor of his wife and son, the estate, use, and enjoyment should go to the Lords Vere for the time being as far as the rules of law and equity would permit; that is, to the person who should be Lord Vere at the death of the survivor of the wife and son, and in point of intention to each succeeding Lord Vere, as far as the rule would admit. The wife survived the testator and took under the first limitation. The son upon her decease took under the second limitation; and at his death the use of the chattels vested under the limitation in the grandson, the third Lord Vere. He by his first marriage had one daughter, now Lady Coventry the Respondent. By his second marriage he had a son, the fourth Lord Vere, who died an infant two months old. The Respondent Lady Coventry is his personal representative. The Duchess of St. Albans was executrix of the will of the third Lord Vere. The Appellant is her executrix and claims under her,

and that claim must prevail, if the third Lord Vere did by the rule of law take an absolute interest in the chattels. If he took a life interest only, and the infant, the fourth Lord Vere, took the absolute interest, then Lady Coventry as his representative is entitled to the chattels, and certainly the fourth Lord Vere did take the interest, if the limitation over to the successive Lords Vere was legal, and carried the property as contended by the Respondents. He was not in being at the date of the will, though he afterwards became Lord Vere, and he being Lord Vere might take an absolute interest, if their construction is admissible; and the question is, whether the limitation is, to this extent, such as the law permits; that is, whether a limitation or remainder for life to such person as should be Lord Vere at the expiration of the lives named, and so in succession to Lords Vere, is a legal limitation so as to carry the interest to any person being Lord Vere, after the death of the grandson of the testator, the third Lord Vere.

It is a case of the greatest difficulty, and wholly without any applicable precedent. Three authorities in particular have been cited, which might be thought to cast a glimmering of light upon the case. *The Countess of Lincoln v. the Duke of Newcastle* furnishes some principle, but cannot be applied to this case as a direct authority. The same observation occurs as to *Leake v. Robinson*, the doctrine of which decision is indisputable. The case of *Procter v. the Bishop of Bath and Wells* contains something of principle bearing upon the question; but the case itself is not only different in circumstances, but it cannot be cited as a decision, bearing directly as an authority upon this

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case. That was a question arising upon an ad-vowson limited in settlement. By the rules of law it could not be tied up beyond lives in being, and twenty-one years afterwards, or the duration of infancy with a period for gestation which has been superadded by subsequent cases, and it has been since held in the late case of *Cadell v. Palmer*, that the twenty-one years may be limited as a term in gross without reference to infancy. But in *Procter v. Bath and Wells* the limitation after lives in being was to depend upon the contingency of an unborn person taking holy orders, which was too remote, because he could not be in deacon's orders before the age of twenty-three, nor in priest's orders before twenty-four, which was two or three years beyond the legal bounds for the vesting of limitations over.

On the whole I cannot say, that the case of *Procter v. the Bishop of Bath and Wells* is applicable as a direct authority to this case. Whatever there is of legal principle to be drawn from it may be considered as favourable to the Appellant. The case therefore has been argued, and must be decided upon principle. It is admitted that in the events which have happened, the end might have been attained by the testator's vesting the interest in Duke William, and even in a succeeding Lord Vere. But with a qualification to determine all interest on events happening within the limits of the rule, or it might have been effected by annexing the gift to the limitations of the land, and directing that the chattels should go in the same course of limitation. But to annex personal chattels to a title of honour is equally difficult upon any view of the nature of the estate in a dignity, whether it is to be considered as a succession of



inheritances, and whether in fee or in tail, even if it is in each individual an estate only for life, a subject cannot engraft on such an estate by way of limitation estates for lives in perpetual succession, so as to make each of them a purchaser. If he attempts to create a fee tail in chattels, the interest vests absolutely in the first *quasi* donee in tail. It is a new species of investiture or limitation of estate unknown to the law, treating the Lords Vere as a species of corporation sole, to whom the estate is to be limited.

The person who secondly after the death of the testator became Lord Vere (the grandson) was in *esse* at the date of the will; but whether he would take, or whether he would ever be Lord Vere, was at the time uncertain. The next life estate after those named in the will was not to the person by name, but to the Lord Vere, whoever he might be. It was an attempt to create a new species of limitation in succession to spring up with the person contrary to all rule and analogy for restricting the period of tying up or deferring the vesting of estates in fee or absolutely. Being or coming into *esse* is a notion familiar to the law. But a peer does not, in a legal sense, come into existence.

It was argued for the Respondent, that it was the same thing as limiting to the son and grandson and great grandson successively, because they must succeed to the inheritances of the dignity in this order. But that view is not quite accurate; for it was not certain that either of them would be Lord Vere. Upon a barony in fee, by writ of summons or creation, the first taker might have a son, and that son might have only two daughters; what person would then take the title? It would be in abeyance;

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and until the Crown should please to select one of them to hold the dignity, it would remain in abeyance, and there might be no peer during the lives of the two coheiresses. In the case put of an abeyance of the title, the Crown might not select either or any of the daughters; and in that case the title might remain in abeyance for a century; and such an event would demonstrate that the limitation is not partially, but altogether void. It is said that the case has not happened; but the soundness of the limitation cannot depend upon contingencies which may cause it to be good or bad, according to the event.

Suppose, again, the limitation of this peerage to be by patent. If the eldest son had a brother who would succeed in default of issue of the eldest son, who afterwards commits treason and is attainted; — during the life of that son, and so long as there is any issue of that eldest son, the title would remain in abeyance. The title would not be extinct; but would be in the Crown, so long as any of his issue should exist\*; and, upon failure of the issue of the attainted person there might again be a Lord Vere. These instances shew the novelty of the invention, and the difficulty of giving it complete effect. There is a distinction between limitations upon events known to the law, and such as the testator in this case has made the basis of his limitation. Peerages are not by the hand of nature, but of the creation of the Crown; and their origin and continuance is uncertain. To argue from the fact, that the person was in *esse* at the date of the will, who became Lord Vere, is to rely upon an accident.

\* Plowden, 557. as to land.

The event might have been otherwise. He would not *ex necessitate* answer the description within the allowed period. A limitation to be supported must be definite and certain to the man or to the peer as an individual. It is not allowable to contend, that at one time and for one purpose, it is to the man, and for another time and purpose to the peer. The estate must be certain so as within the time to vest in the person described, either in his natural or his politic capacity. In the politic capacity, there was no such Lord Vere in *esse* in whom the estate could within that time certainly vest. Upon the grounds which I have stated, I find it impossible to advise your Lordships to affirm this decree.

Lord *Lyndhurst* observed that he did not give the judgment in the Court below entirely without doubt, and, upon the whole, was of opinion that it would be the safest course to reverse the decree, if it were only to repress such inventions. He further observed, that the arguments upon the subject of the abeyance of peerages urged by his noble friend the Lord Chancellor were entirely new: that in affirming the decree, the House must decide against a strong current of authorities; but not so if they reversed.

Decree reversed.

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## ENGLAND.

(COURT OF CHANCERY.)

The Reverend BIDLAKE BRAY, }  
Clerk - - - - - } *Appellant.*

ELIZABETH (BREE,) formerly ELIZA- }  
BETH MALKIN, JOSIAH SPODE, }  
WILLIAM HAMMERSLEY \*, and } *Respondents.*  
JOHN TOMLINSON - - - - - }

J. S. the elder, in contemplation of the marriage of his daughter E. B. secured to her the sum of 8000*l.* with interest, by his bond dated in 1805.

By indenture of the same date with the bond, E. B., with the consent of her intended husband, assigned the bond for 8000*l.* to W. H. and J. S. in trust for J. S., until the marriage; and after the solemnization thereof, upon trust, to pay the interest thereof to E. B. for her life for her separate use; and after her decease, in case her intended husband should survive her, then to pay the interest thereof to him for his life; and after the decease of the survivor of them, then, as to the principal of the 8000*l.* (subject to the joint appointment of E. B. and her intended husband, in favour of the children of their marriage, and in case E. B. should happen to survive her intended husband), "in trust for all and every the child and children of E. B. by, &c. in such shares and proportions, "and to be paid at such age or ages, time or times, and with "such benefit of survivorship or otherwise, and subject to, "with, and under such conditions, restrictions, and limitations "over the same, to be always for the benefit of some one or "more of such child or children, as the said E. B. alone, at "any time or times, by any deed or deeds, writing or writ-

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\* The Respondent W. H. died after the petition of appeal was presented, and cases printed, and his executors were substituted as Respondents by revivor.

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ings, either with or without power of revocation, to be by her sealed and delivered in the presence of, and attested by, two or more credible witnesses, or by her last will or testament in writing, or any writing in the nature of her last will and testament, to be by her signed and published in the presence of, and to be attested by, the like number of witnesses, should direct, limit, or appoint;" and in default of such direction or appointment by E. B., in the event of her surviving her intended husband, without having jointly with him made any appointment of the said trust fund, or as to so much of the said trust premises whereof no complete direction or appointment should have been made by her, "in trust for all and every the child or children of E. B. by, &c. equally to be divided amongst them, if more than one, share and share alike; and in case there should be but one such child, then in trust for such one or only child for his and her and their portion and portions, the parts and shares thereof, or the whole thereof, to be paid to such children or child," being a son or sons, on the attainment of the age of twenty-one years, and being a daughter or daughters, at the like age, or on marriage with such consent and approbation as therein mentioned.

In 1806, the husband died, without having joined in making any appointment of the 8000*l.*, leaving a daughter, S. E. M., the only child of the marriage.

In 1825, B. B. intermarried with S. E. M. with the consent and approbation required by the settlement, and no further settlement was made of the 8000*l.*

By a deed poll in 1827, duly sealed, delivered, and attested in conformity with the power contained in the settlement, E. B. directed, limited, and appointed that W. H. and J. S., &c. and the trustee and trustees for the time being of the said indenture of settlement, should stand possessed and interested of and in the said sum of 8000*l.*, secured by the said bond as aforesaid, and other the securities upon which the same money, or any part thereof, should for the time being be invested (subject only to her life interest therein), upon trust immediately after her decease, or as soon thereafter as should be required, to pay, assign, and transfer the said trust monies and securities or any of them, and every or any part or parts thereof, unto such person or persons for such interest or interests, and in such parts and shares and proportions upon such trusts, and to and for such ends, intents, and purposes, and with and under and subject to

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“ such provisions and restrictions, or otherwise in such manner  
 “ and form as S. E. B. (the wife of B. B.) at any time or times,  
 “ and from time to time, during the life of her the said E. B.  
 “ or after her decease, and notwithstanding her then present  
 “ or any future coverture, by any deed or deeds, or writing or  
 “ writings, with or without power of revocation, to be by her  
 “ sealed and delivered in the presence of and attested by two  
 “ or more credible witnesses, or by her last will or testament  
 “ in writing, or by any codicil or codicils thereto, or any  
 “ other writing purporting to be or in the nature of her, last  
 “ will or testament, to be by her signed and published in the  
 “ presence of two or more credible witnesses, should direct  
 “ or appoint; and in default of such direction or appoint-  
 “ ment, and in the mean time until any such direction or  
 “ appointment should be made, then and as to such part or  
 “ parts if any of the said trust monies and securities, or the  
 “ interest and yearly income thereof, whereunto such direc-  
 “ tion or appointment should not extend, or as to which the  
 “ same should be partial or incomplete, but subject and with-  
 “ out prejudice thereto, upon trust during the life of the said  
 “ S. E. B. to receive and pay, apply, and dispose of the in-  
 “ terest and yearly income of the said trust monies and securi-  
 “ ties unto such person or persons, and for such intents and  
 “ purposes, as she the said S. E. B. should at any time or  
 “ times, and from time to time, notwithstanding her then pre-  
 “ sent or any future coverture, by any writing or writings  
 “ under her hand direct or appoint; and in default of such  
 “ direction or appointment upon trust to pay the same in-  
 “ terest and yearly income into the proper hands of her the  
 “ said S. E. B., or otherwise to permit her to receive and  
 “ take the same to and for her sole and separate use and  
 “ benefit, exclusively of B. B. or any future husband, to the  
 “ intent that the same might not be subject or liable to the  
 “ debts, control, interference, or engagements of B. B. or any  
 “ future husband; and that the receipt of the said S. E. B.  
 “ or of such appointee or appointees as last aforesaid, and  
 “ such receipt alone, should from time to time be a sufficient  
 “ discharge for so much of the said interest and yearly in-  
 “ come as in such receipt should be acknowledged, or ex-  
 “ pressed to have been received; and from and after the  
 “ decease of the said S. E. B., should pay, transfer, and  
 “ assign the said trust monies and securities, or such unap-  
 “ pointed part or parts thereof as aforesaid, unto the execu-  
 “ tors or administrators of the said S. E. B. as part of her  
 “ personal estate.”

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S. E. B., by her will, dated after her majority and duly signed and published by her in compliance with the formalities required by the power vested in her by deed poll, directed, limited, and appointed that "W. H. and W. S. and the trustees and trustee for the time being of the indenture of settlement, should stand possessed of, and be interested in, the said sum of 8000*l.* secured by the said bond as aforesaid, and other the securities upon which the same money, or any part thereof, should for the time being be invested, from and after the decease of E. B., in trust for the absolute benefit of her dear uncle, W. H., his executors, and administrators, and upon and for no other trust, intent, or purpose whatsoever, and which she declared she meant as a tribute of affectionate gratitude for his constant kindness and protection from her infancy, and particularly for the recent instances of it which she had experienced since her separation from her husband."

S. E. B. died without having altered or revoked her will; leaving her husband surviving.

A bill filed by the husband against the trustees praying a declaration that, under the circumstances before stated, he was entitled, after the death of E. B., to the 8000*l.*, and that it might be secured for his benefit, was dismissed with costs; and that order was affirmed on appeal, but without costs.

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IN Easter term, 1827, the Appellant, the Rev. Bidlake Bray, exhibited his bill of complaint in the Court of Chancery against the above named Respondents, thereby stating, that by an indenture, bearing date the 25th of November, 1805, between Broad Malkin, Esq., of the first part, Elizabeth Spode, spinster, of the second part, Josiah Spode, father of the said Elizabeth Spode, of the third part, and William Spode and Josiah Spode, the younger, of the fourth part, being the settlement made previous to the then intended marriage between the said Broad Malkin and Elizabeth Spode. After reciting that in prospect of, and reference to, such marriage, and with a view of making some

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provision for the said Broad Malkin and Elizabeth Spode, and for the issue of the said intended marriage, the said Josiah Spode had, by his bond bearing even date with the said indenture, become bound to the said Elizabeth Spode in the penal sum of 16,000*l.*, with a condition thereunder written for making void the same on payment of 8000*l.*, with interest at the rate of 5*l.* per centum, at the time therein mentioned, which said 8000*l.* was in the said indenture stated to be the present fortune then agreed to be given by the said Josiah Spode on the marriage of his said daughter, and which upon the treaty for the said marriage was agreed to be vested in the said William Spode and Josiah Spode, the younger. Upon the trusts thereafter declared, and for the considerations thereafter mentioned, the said Elizabeth Spode, with the consent of the said Broad Malkin, assigned unto the said William Spode and Josiah Spode, the younger, their executors, administrators, and assigns, the said bond and the penalty thereof, and the said sum of 8000*l.* thereby secured, and all interest thenceforth to grow due in respect thereof, and all benefit and advantage thereof respectively. And it was thereby agreed and declared, that the said William Spode and Josiah Spode, the younger, and the survivor of them, and the executors, administrators, and assigns of such survivor should stand possessed of and interested in the same, and the growing interests and proceeds thereof, upon the trusts following; that is to say, in trust for the said Josiah Spode, the father, his executors and administrators, until the said intended marriage; and after the solemnization thereof, upon trust to pay the interest, income, and proceeds of the said sum of



8000*l.*, when and as the same should become due and be received unto the said Elizabeth Spode for and during her natural life, to and for her own sole and separate use and benefit, or to such person or persons as she, by writing under her hand, should from time to time, notwithstanding her coverture, direct or appoint; and from and after the decease of the said Elizabeth Spode, in case the said Broad Malkin should survive her, upon further trust to pay to or to permit and suffer or fully authorise and empower the said Broad Malkin and his assigns during the term of his natural life, to have, receive, take, and enjoy the interest, income, and proceeds of the said sum of 8000*l.*, as the same should arise from time to time, or become due and payable to and for his and their own use and benefit; and from and after the decease of the survivor of them the said Broad Malkin and the said Elizabeth, his intended wife, it was thereby agreed and declared, that the said William Spode and Josiah Spode, the younger, and the survivor of them, his executors, administrators, and assigns, should stand possessed of, and interested in, the said principal sum of 8000*l.*, so then secured upon the said therein-before recited bond, and the accumulating interest, income, and proceeds thereof, from thenceforth, and of and in the securities or funds on or in which the same or any part thereof should be then invested or placed out in trust, for all and every the child and children of the said Elizabeth Spode, by the said Broad Malkin, to be begotten, in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship or otherwise, or subject to, with and under such conditions, restrictions, and

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limitations over the same, to be always for the benefit of some one or more of such child or children, as they, the said Broad Malkin and Elizabeth Spode, at any time or times, by any deed or deeds, writing or writings, with or without power of revocation to be by both of them sealed and delivered in the presence of, and attested by two or more credible witnesses, should jointly direct, limit, or appoint. And for want or in default of such joint direction or appointment, or as to so much of the said trust premises whereof no complete direction or appointment should have been jointly made; and in case the said Elizabeth Spode should happen to survive the said Broad Malkin, her intended husband, but not otherwise, then in trust for all and every the child and children of the said Elizabeth Spode, by the said Broad Malkin to be begotten, in such shares and proportions, and to be paid at such age or ages, time or times, and with such benefit of survivorship or otherwise, and subject to, with and under such conditions, restrictions, and limitations over the same, to be always for the benefit of some one or more of such child or children, as the said Elizabeth Spode alone at any time or times, by any deed or deeds, writing or writings, either with or without power of revocation, to be by her sealed and delivered in the presence of, and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing in the nature of her last will and testament, to be by her signed and published in the presence of and to be attested by the like number of witnesses, should direct, limit, or appoint; and for want or in default of such joint direction or appointment, or as to so much of the

said trust premises, whereof no complete direction or appointment should have been jointly made by the said Broad Malkin and Elizabeth Spode as aforesaid; and in case the said Elizabeth Spode should happen to die in the lifetime of the said Broad Malkin, leaving him surviving, whereby the sole direction or appointment would not take effect as aforesaid, or for want of or in default of such direction or appointment by the said Elizabeth Spode, so therein-before given and reserved to her in the event of her surviving the said Broad Malkin, or as to so much of the said trust premises, whereof no complete direction or appointment should have been made by the said Elizabeth Spode, under the said last-mentioned power, then in trust for all and every the child and children of the said Elizabeth Spode by the said Broad Malkin to be begotten, equally to be divided amongst them, if more than one, share and share alike; and in case there should be but one such child, then in trust for such one or only child, for his and their portion and portions, the parts and shares thereof, or the whole thereof, to be paid to such children or child in the manner following; that is to say, the part or share, parts or shares of such of them as should be a son or sons at his or their age or respective ages of twenty-one years, and the part or share, parts or shares of such of them as should be a daughter or daughters, to be paid at her or their age or respective ages of twenty-one years, or day or respective days of marriage, which should first happen, provided such marriage or marriages respectively previous to twenty-one be had with the consent and approbation in writing of the said Broad Malkin and Elizabeth Spode, or of the survivor of

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them, and after the several deceases of the trustees or trustee for the time being, under the said now reciting indenture, or of the guardian or guardians for the time being of the same daughter or daughters respectively ; but no such assignment, transfer, or payment was to be made until after the death of the survivor of the said Broad Malkin and Elizabeth Spode : provided always, and it was thereby declared and agreed by and between the parties thereto, that in default of any such direction or appointment as aforesaid, and in case any such child or children, being a son or sons, should attain his or their age or respective ages of twenty-one years, or being a daughter or daughters, should attain her or their age or respective ages of twenty-one years, or be married with such consent as aforesaid, before such age or respective ages, then and from thenceforth, notwithstanding the postponing the payment of the said share or shares till after the decease of the said Broad Malkin and Elizabeth Spode, and the survivor of them, all and every the right and interest, or rights and interests of the same son or sons so attaining the said age of twenty-one years, and of such daughter or daughters so attaining the like age, or marrying with such consent as aforesaid before such age, of, in, and to the said trust, securities, monies, and premises, or such part thereof, whereof no such direction or appointment should have been made as aforesaid, should respectively be and be considered as a vested interest or vested interests in the same child or children, and should be transmissible to his, her, or their executors or administrators notwithstanding the subsequent death of such child or children in the lifetime of their parents or of the

survivor of them; with power to appoint new trustees, &c.

The bill further stated that the intended marriage between Broad Malkin and Elizabeth Spode was shortly after the date and execution of the indenture of settlement duly had and solemnized, and that Broad Malkin departed this life some time in the year 1806, without having joined with Elizabeth his wife in making any appointment of the said sum of 8000*l.*, leaving Saba Eliza, lately the wife of the Appellant, and now deceased, the only issue of the marriage him surviving, and that there was never any other issue of the marriage: that on or about the 28th of April, 1825, the Appellant intermarried with Saba Eliza Malkin, with the consent and approbation of Elizabeth Bree, then Elizabeth Malkin, her mother; and that by a certain indenture dated the 23d of April, 1825, and made previously to, and in contemplation of, the intended marriage between the Appellant and Saba Eliza Malkin, a settlement was made of a certain other sum of 10,638*l.* 6*s.* three per cent. consolidated Bank annuities, but that the settlement did not in any way affect or refer to the sum of 8000*l.* therein-before mentioned, or the interest of Saba Eliza Bray in the said sum of 8000*l.* or any part thereof: that Josiah Spode, the elder, departed this life on the 16th of July, 1827, after having duly made and published his last will and testament in writing, bearing date the 18th of October, 1825, and thereby appointed his sons William Spode, who has since taken the name of William Hammersley, and Josiah Spode, the younger, two of the Respondent's executors thereof: that soon after the decease of the said testator, the Respondent William Hammersley, and the other Re-

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Respondent Josiah Spode, the younger, duly proved the said will in the proper ecclesiastical court, and took upon themselves the execution thereof, and under and by virtue of the probate copy of the will, they possessed themselves of the personal estate and effects of the said testator, to a considerable amount, and more than sufficient for the payment of his funeral, and testamentary expenses and debts, and the legacies bequeathed by the said will; and that Saba Eliza Bray, being in her lifetime desirous of exercising the several powers and appointments respectively given to her by and under the indenture of the 23d of April, 1825, and the will of Josiah Spode, made and published a certain instrument in writing, purporting to be her last will and testament, bearing date the 3d day of January, 1828, whereby she disposed of the bond so given by Josiah Spode, as aforesaid, and the sum of 8000*l.* thereby secured, and also another sum of 32,000*l.* bequeathed by the will of Josiah Spode, which said several sums were subject to the life interest of the said Elizabeth Bree, then Elizabeth Malkin, therein, and also of the said sum of 10,688*l.* 6*s.* three per cent. consolidated Bank annuities, subject to the life interest of the Appellant therein, and thereby appointed the Respondent William Hammersley, sole executor thereof.

The bill further stated, that Saba Eliza Bray departed this life on or about the 16th of May, 1828, and that the Respondent, William Hammersley, proved the said instrument as the will of Saba Eliza Bray, on or about the 25th of February, 1829; and that Josiah Spode, the younger, being desirous of being discharged from the trusts of the indenture of settlement of the 25th of November,

1805, and John Tomlinson, another of the Respondents, having consented to act with William Hammersley, as trustee, in the place or stead of Josiah Spode, Elizabeth Malkin, by virtue and in execution of the power to her for that purpose, in the indenture of settlement reserved, nominated, and appointed the Respondent John Tomlinson, to be a co-trustee with William Hammersley, under the trusts of the indenture of settlement; and that the premises in the indenture of settlement contained, were accordingly, by a certain indenture of appointment, bearing date the 24th of March, 1829, duly conveyed to William Hammersley and John Tomlinson, as such trustees: that William Hammersley and John Tomlinson, as such trustees, or William Hammersley and Josiah Spode, the younger, as the executors of the last will and testament of Josiah Spode, the elder, then had in their hands or in their custody or power, and under their control, the said sum of 8000*l.*, so secured on bond as aforesaid; and that Saba Eliza Bray had no power or authority whatsoever, to dispose of the said several sums, or any one of them, by her said will, but that upon her death the said several sums became vested in the Appellant as her legal personal representative.

The bill charged, that no valid appointment of the said sum of 8000*l.*, under the power contained in the said indenture of settlement of the 25th of November, 1805, had ever been made; and that if any instrument purporting to be a valid appointment of the said sum had really been made and executed, yet inasmuch as Saba Eliza Bray was the only child of the marriage of Broad Malkin and Elizabeth Malkin, and there never was any

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other child of the said marriage, Elizabeth Malkin was not authorised by and under the trusts and powers in the indenture of settlement of the 25th of November, 1805, to make any appointment of the said sum of 8000*l.* or to appoint the same so as to give it to Saba Eliza Bray, for her sole and separate use, or to give to the said Saba Eliza Bray a power of appointing the said sum of 8000*l.* by will: that by and under the trusts of the indenture of settlement of the 25th of November, 1805, Saba Eliza Bray had, during her lifetime and at the time of her death, a vested interest in the said sum of 8000*l.*, subject only to the interest of Elizabeth Malkin, her mother, during the term of her natural life; and that the Appellant, having survived Saba Eliza Bray, his late wife, was entitled absolutely in right of Saba Eliza Bray, upon the death of Elizabeth Malkin, to the principal sum of 8000*l.*; he further charged and insisted that the said sum of 8000*l.* ought to be properly secured and invested upon the trusts and according to the powers in the indenture of settlement of the 25th of November, 1805, in that behalf contained, for the benefit of Elizabeth Malkin, during her natural life, and after her decease for the absolute benefit of the Appellant.

The bill prayed that the trusts of the indenture of settlement of the 25th of November, 1805, might be declared and carried into effect by and under the direction and decree of the Court, and that it might be declared that he, the Appellant, was entitled, under the circumstances aforesaid, to the said principal sum of 8000*l.* upon the death of Elizabeth Malkin; and that the said sum of 8000*l.* might be secured and invested by and under the



direction and decree of the Court, and that if necessary the said sum of 8000*l.* might be raised out of the assets of the testator Josiah Spode, the elder, and if William Hammersley and Josiah Spode, the younger, should not admit assets of the testator Josiah Spode, come to their hands or use, sufficient to answer the said bond debt of 8000*l.*, then that the usual accounts might be taken of the personal estate and effects of Josiah Spode, the elder, and that the same might be applied in a due course of administration; and that William Hammersley and John Tomlinson might be restrained by and under the order and injunction of the Court from paying or transferring the said principal sum of 8000*l.* otherwise than for the benefit of the Appellant or his assignees, &c.

The Respondents, Elizabeth (Bree), late Elizabeth Malkin, William Hammersley, and John Tomlinson, by their answers to the bill, admitting the principal facts as stated by the bill, alleged that Elizabeth (Bree), late Elizabeth Malkin, after the death of Broad Malkin, to wit, on the 11th of April, 1827, duly sealed and delivered a deed poll in writing, in the presence of and attested by two credible witnesses, and bearing date the 11th of April, 1827, whereby after reciting the bond and the indenture of the 25th of November, 1805, and also reciting the death of Broad Malkin; and that Saba Eliza Bray was the only child of the marriage of Broad Malkin and Elizabeth his wife, and that there never was any other child; and that Elizabeth (Bree), then Elizabeth Malkin, was then desirous of exercising the power of appointment given to her by the therein recited indenture of settlement, in the event which happened, of De-

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fendant Elizabeth (Bree), then Elizabeth Malkin, surviving her husband, in manner herein-after expressed: It was witnessed that Elizabeth (Bree), then Elizabeth Malkin, by, for, at, or in virtue, and in exercise and execution of the sole power or authority to her given, in and by the indenture of the 25th of November, 1805, and of every other power or authority in her vested, or in any wise enabling her in that behalf, and by that deed or writing, by her sealed and delivered and attested as therein-before mentioned, irrevocably direct, limit, and appoint that William Hammersley, formerly William Spode and Josiah Spode, the younger, and the survivor of them, their and his executors, administrators, and assigns, and the trustee and trustees for the time being of the therein recited indenture of settlement, should stand possessed and interested of and in the said sum of 8000*l.* secured by the said bond as aforesaid, and other securities, upon which the same money or any part thereof, should, for the time being, be invested, subject only to the said Elizabeth's life interest therein, upon trust, immediately after the decease of the said Elizabeth (Bree), then Elizabeth Malkin, or so soon after as should be required, to pay, assign, and transfer the said trust monies and securities, or any of them, and every or any part or parts thereof, unto such person or persons, for such interest or interests, and in such parts, shares, and proportions, upon such trusts, and to and for such ends, intents, and purposes, and with, under and subject to such provisions and restrictions, or otherwise, in such manner and form, as Saba Eliza Bray, at any time or times, and from time to time, during the life of the said Elizabeth (Bree),

then Elizabeth Malkin; and after her decease, and notwithstanding her then present or any future coverture by any deed or deeds, writing or writings, with or without power of revocation, to be by her sealed and delivered in the presence of, and attested by two or more credible witnesses, or by her last will and testament in writing, or any codicil or codicils thereto, or other writing purporting to be, or in the nature of her last will and testament, to be by her signed and published in the presence of two or more credible witnesses, should direct or appoint: and in default of such direction or appointment, and in the mean time and until any such direction or appointment should be made, then, and as to such part or parts of any of the trust monies and securities, and the interest and yearly income thereof whereunto such direction or appointment should not extend, or as to which the same should be partial or incomplete, but subject and without prejudice thereto, upon trust during the life of Saba Eliza Bray, to apply the income of the said trust monies in the manner therein expressed, and from and after the decease of Saba Eliza Bray, should pay, transfer, and assign the said trust monies or securities, or such unappropriated parts or part thereof as aforesaid, unto the executors or administrators of Saba Eliza Bray, as part of her personal estate.

The Respondents by their answer further stated, that on the 3d of January, 1828, Saba Eliza Bray signed and published her last will and testament in writing, or a writing purporting to be, or in the nature of her last will and testament, in the presence of, and attested by two credible witnesses, and bearing date the 3d of January, 1828, whereby

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after reciting, among other things, the bond and indenture of settlement of the 25th of November, 1805, and the death of Broad Malkin, and that Saba Eliza Bray was the only child of Broad Malkin and Elizabeth his wife; and also reciting the deed poll of the 11th of April, 1827, and that Saba Eliza Bray was desirous of exercising, among other powers, the power of appointment given to her by the deed poll of the 11th of April, 1827, Saba Eliza Bray, by force and virtue of, and in exercise and execution of the power and authority to her given in and by her in the deed poll of the 11th of April then last, and of all and every other power and authority in her vested, or in anywise enabling her in that behalf, did by her last will and testament in writing, by her signed and published, in the presence of, or intended to be signed by her in the presence of two credible witnesses, direct, limit, and appoint in manner therein-after mentioned, that is to say, as, to, for and concerning the said sum of 8000*l*., secured by the said bond as aforesaid, that William Hammersley and Josiah Spode, the younger, and the survivor of them, their and his executors, administrators, and assigns, should stand possessed of and interested therein, from and after the decease of the said Elizabeth Bree, then Elizabeth Malkin, in trust for the absolute benefit of her dear uncle, the said William Hammersley, formerly William Spode, his executors and administrators, and upon or for no other use or trust, intent or purpose whatsoever, and which she declared she meant as a tribute of affectionate gratitude for his constant kindness and protection from her infancy, and particularly for the recent instances of it, which she had experienced since

her separation from her husband; and she appointed the Defendant William Hammersley sole executor of her will.

The Respondents admitted that Saba Eliza Bray died at the time in the bill mentioned; that she did not revoke or alter her will, and that the said William Hammersley proved the will or testamentary instrument in the manner and at the time in the bill mentioned; and the Respondent William Hammersley stated that he was advised, and submitted to the judgment of the Court, that Saba Eliza Bray had, under the deed poll of the 11th of April, 1827, power and authority to dispose by will of the said sum of 8000*l.*, subject to the life interest of Elizabeth Bree therein, and that the will of Saba Eliza Bray was a valid appointment thereof, and, therefore, that the Appellant did not upon the death of Saba Eliza Bray, or by any other means become entitled by right, as in the bill mentioned, to the said sum of 8000*l.*, and the proceeds thereof, upon the decease of Elizabeth Bree, but that he William Hammersley became and was then entitled thereto.

The Respondents by their answer further stated, that William Hammersley, as the surviving executor of Josiah Spode, the elder, deceased, had, in discharge of the said bond, invested the said sum of 8000*l.* in the purchase of 8521*l.* 19*s.* 4*d.* three per cent. consolidated Bank annuities, in the names of William Hammersley and John Tomlinson, the trustees of the indenture of settlement of the 25th of November, 1805, and that the sum of 8521*l.* 19*s.* 4*d.*, three per cent. consolidated Bank annuities, was then standing in the names of William Hammersley

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and John Tomlinson, in the books of the governor and company of the Bank of England.

The Respondent John Tomlinson, by his answer, stated himself to be a mere trustee of the said sum of 8521*l.* 19*s.* 4*d.*, three per cent. consolidated Bank annuities, and the interest and dividends thereof, and that he claimed no beneficial interest therein, and that he submitted to act in such manner as the Court should direct.

On the 22d of May, 1830, the cause came on to be heard before the Vice-Chancellor, who thereupon ordered that the Appellant's bill should stand dismissed with costs.

The Appeal was against this order.

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For the Appellant, the *Solicitor General*, Mr. Preston (and Mr. William Russell).

It is now established that a power being a mere power of distributing among the objects, supposing there to be more than one, the power of appointment in favour of the one, in the event of there being but one, does not arise. The terms of the power, although the word *child* is found in the singular number, are in the usual phraseology used in these powers where it is intended to distribute among a number of objects. The word "*child*" is used in the singular number, for the purpose of providing for the appointment in favour of one, to the exclusion of the others, in which case there must be an appointment, because, as in the event of there being no appointment, all would take equally; a parent wishing to provide for one to the exclusion of others, or giving a greater preference to one over the others, it is necessary that in the

terms of the power, you should find the word child : otherwise the intention to be executed of making an appointment favourable to one, in opposition to others might fail. The words are "in trust for all "and every the child and children." Now we must read that "every the child." Now "every "the child," although in the singular number, implies a plurality of persons. It is an individual child, or a greater number than one. If it stood quite alone this would be apparent.

*The Lord Chancellor.* — That is not very grammatical. The term is used in all conveyancing, and in all proceedings both in law and equity. Where you mean to include a singular, and also a plural — a possible plural and a possible singular — you say "all and every the messuages," the messuages would mean one messuage, as well as all messuages. It would certainly be ungrammatical to say "*I give to all the child,*" "*all*" applies to the plural. "Every" will apply to the singular in that collocation, but it indicates a plurality, otherwise "every child" would be *any*. "All or any of the "child and children" would do.

*The Solicitor General.* — The only words which can be contended for in this clause, as giving a power of appointment in favour of one, there being but one, are words of condition and restriction. Limitations over in favour of some other child or children, cannot give the benefit: there must for that purpose be a plurality of children, and the words of condition and restriction are introduced as part of the same sentence. There may be conditions, restrictions, and limitations over, but then each and every of those restrictions upon the enjoyment, must be always for the benefit of some

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after reciting, among other things, the bond and indenture of settlement of the 25th of November, 1805, and the death of Broad Malkin, and that Saba Eliza Bray was the only child of Broad Malkin and Elizabeth his wife; and also reciting the deed poll of the 11th of April, 1827, and that Saba Eliza Bray was desirous of exercising, among other powers, the power of appointment given to her by the deed poll of the 11th of April, 1827, Saba Eliza Bray, by force and virtue of, and in exercise and execution of the power and authority to her given in and by her in the deed poll of the 11th of April then last, and of all and every other power and authority in her vested, or in anywise enabling her in that behalf, did by her last will and testament in writing, by her signed and published, in the presence of, or intended to be signed by her in the presence of two credible witnesses, direct, limit, and appoint in manner therein-after mentioned, that is to say, as, to, for and concerning the said sum of 8000*l.*, secured by the said bond as aforesaid, that William Hammersley and Josiah Spode, the younger, and the survivor of them, their and his executors, administrators, and assigns, should stand possessed of and interested therein, from and after the decease of the said Elizabeth Bree, then Elizabeth Malkin, in trust for the absolute benefit of her dear uncle, the said William Hammersley, formerly William Spode, his executors and administrators, and upon or for no other use or trust, intent or purpose whatsoever, and which she declared she meant as a tribute of affectionate gratitude for his constant kindness and protection from her infancy, and particularly for the recent instances of it, which she had experienced since



her separation from her husband; and she appointed the Defendant William Hammersley sole executor of her will.

The Respondents admitted that Saba Eliza Bray died at the time in the bill mentioned; that she did not revoke or alter her will, and that the said William Hammersley proved the will or testamentary instrument in the manner and at the time in the bill mentioned; and the Respondent William Hammersley stated that he was advised, and submitted to the judgment of the Court, that Saba Eliza Bray had, under the deed poll of the 11th of April, 1827, power and authority to dispose by will of the said sum of 8000*l.*, subject to the life interest of Elizabeth Bree therein, and that the will of Saba Eliza Bray was a valid appointment thereof, and, therefore, that the Appellant did not upon the death of Saba Eliza Bray, or by any other means become entitled by right, as in the bill mentioned, to the said sum of 8000*l.*, and the proceeds thereof, upon the decease of Elizabeth Bree, but that he William Hammersley became and was then entitled thereto.

The Respondents by their answer further stated, that William Hammersley, as the surviving executor of Josiah Spode, the elder, deceased, had, in discharge of the said bond, invested the said sum of 8000*l.* in the purchase of 8521*l.* 19*s.* 4*d.* three per cent. consolidated Bank annuities, in the names of William Hammersley and John Tomlinson, the trustees of the indenture of settlement of the 25th of November, 1805, and that the sum of 8521*l.* 19*s.* 4*d.*, three per cent. consolidated Bank annuities, was then standing in the names of William Hammersley

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doctrine is recognized, is the case of *Campbell v. Sandys*.\*

*The Lord Chancellor*. — The words are not the same: I have been looking at it.

*The Solicitor General*. — They are not: but the principle established in those two cases, and referred to in *Campbell v. Sandys*, was the ground on which Lord Redesdale decided that case. And although the words are not identically the same, putting this construction upon the terms, that they were intended merely for the purpose of giving a power of distribution among a plurality of children, then it is impossible to distinguish the cases.

*The Lord Chancellor*. — Suppose there having been two children, one of them died before the power was executed?

*The Solicitor General*. — It is decided by the case of *Boyle v. the Bishop of Peterborough*†, that the power then may be exercised, there having been a plurality, because otherwise you would defeat the object altogether. If no appointment had taken place, then those who claimed through the one in default of appointment, of course would interfere with the distribution the parent might have intended to make, because the child having been born, would become entitled to an interest in that event, and that would defeat the intention of making a provision for the survivor.

In the case of *Campbell v. Sandys*, it was held that “issue” was to be construed “children,” and that the issue of I. and A. took the absolute interest in the chattel property, and a *quasi* fee in the freehold property, and that a *quasi* estate tail could not be

\* 1 Scho. and Lef. p. 281.

† 1 Ves. Jun. 299.

barred by will. Part of the case does not apply to the present point, but part of it does. The Vice-Chancellor distinguished that case from the present, because the words there are "in such shares and proportions, as the said *I.* should appoint;" here we have the words, "in such shares and proportions, and with such conditions, restrictions, and limitations over the same, to be always for the benefit of some one, or more, of such child or children:" but this is in substance and construction the same, although a greater number of terms are introduced. The Vice-Chancellor did not intend to dispute the doctrine of *Campbell* and *Sandys*, but he relied upon the supposed distinction. If there is in substance no such distinction, his judgment should have been with us.

The same doctrine, though it did not come immediately in decision, is recognised in the case of *Folkes v. Western*.\* In the judgment in that case, the Master of the Rolls says, Mrs. Lloyd could give up, but the whole being discretionary, depending first upon the father and mother, and afterwards upon the survivor, how can I say any definite proportion of this has sunk. To what then is it to be compared? There is no analogy but that of the custom of London. In those cases one should think *primâ facie*, the effect of advancement by the father would be to increase the part of the estate of which he would have power to dispose; but it was held otherwise, that it had no effect except to remove that child entirely out of the way, and to increase the shares of the others. This provision must have the same

\* 9 Ves. Jun. 456. See Sugden on Powers, 561. (9d Ed.), and 2 Sim. and Stu. 106. 111.

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effect; putting her out of the question altogether, as if there never had been such a child. Therefore, before the power ever arose there ceased to be objects; for it is impossible Mrs. Western can give any thing to Mrs. Lloyd. That is expressly stipulated, and she is incapable of receiving any more than if she were dead. The consequence is, that one of two objects being removed, the other must of necessity take the whole; the party having the power of disposition, losing that power." That is all we contend for here, that there being a power which was introduced for the purpose of distribution, and the possibility of distribution failing, by there being but one object to take the benefit of the settlement, the power cannot take effect: and therefore, that nothing can intervene between the only individual who is entitled to the benefit, and the absolute enjoyment of the property.

In *Boyle v. the Bishop of Peterborough*, the Lord Chancellor says:—"I think this was intended to vest an interest only in default of appointment. That brings it to the question, whether the power has not lost its opportunity of being exercised by the death of the son, or whether there is a capacity of appointing, when only one child is left, and if at all, whether it must not be with reference to the clause which provides for its going in case of no appointment. The words breed the doubt; where there are only two children, the power by way of exercise of discretion is totally gone by the death of one, before it is exercised, and it cannot be the same power in point of extent as when meant to be a distribution among several, for which it is necessary there should be several. But this clause made it

proper for her to express that she did intend her power to be executed. If there was no appointment, the consequence is, each would be entitled to a moiety, because there was no appointment. In respect of that clause, she had a power to appoint to one only, for though that is not a distribution, it is an expression that it shall go by appointment, and not transmit for want of it. I think the extent of her power is such as to enable her to express her intention : that she has done, and therefore it must go according to the intent." So that here the distinction is taken recognising the principle, that if there never had been more than one, the power would not have existed ; but there having been more than one, the ground of the doctrine is in that case expressly recognised. Now shall the power continue to be capable of being exercised where the same mischief does not arise, as would have arisen in the case of *Boyle v. The Bishop of Peterborough* ? Here no intention could be defeated, here no other person can take but the person pointed out by the settlement, and inasmuch as no other object of the power ever has been *in esse*, of course no person can claim through a person who has not been *in esse*. The only object of the power is an individual, of course therefore the object of the power cannot be called into operation ; there cannot be a distribution, there is not, and never has been more than one object of the power, and the event has not taken place in which the power was intended to be exercised, and consequently the whole property, the 8000*l.* became the absolute property of the only child, and being the absolute property of the only child,

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of course the surviving husband is now, as the administrator to his deceased wife, entitled as her representative to this sum of 8000*l*.\*

For the Respondents, Sir *Edward Sugden* and Mr. *Knight*.

The effect of the appointment is only to give in words what would be given by implication. It is in effect an appointment to the separate use of Saba Eliza Bray. If the mother had said "I give the whole of that 8000*l*. to my daughter Saba Eliza Bray for her separate use," that would have given to the appointee the power which she has by this more enlarged and more formal disposition, for she might have appointed and disposed of the whole by will, and until she did make the appointment, she might have received the whole of the interest for her separate use, exclusive of her husband, and without his controul; and if she had kept any part undisposed of by deed or by will, that portion would have gone as part of her personal estate to her personal representative, and that personal representative would be her executor or administrator.

A gift to the separate use of a woman, without more, includes all those peculiar powers which are contained in this instrument, only that it would not be necessary to have any certain number of witnesses; all that is for the greater protection of the daughter, that she may not be taken by surprise, but the result is that all these formal trusts

\* *Doe v. Martin*, 4 T. R., as showing that the children under a power have a vested interest, and that on appointment to heir, he takes by descent, *Hurst v. Winchelsea*, 1 Blac. 187., were cited by Mr. Preston. *Smith v. Death* he contended was an erroneous decision.

amount only to a disposition for the separate use of the daughter.

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Under a power to appoint to a child, you may appoint to the separate use of that child, being a woman. *Alexander and Alexander* \*, *Pitt and Lord Camelford*. † At first it was contended very seriously that you could not do so, because, if you had a power to appoint to a child, it must go to the child with the common incidents of property, and, therefore, you could not appoint to the separate use of a woman, because you would exclude the right of the husband; and there is some appearance of argument in it; but the Court held that it is to be for the benefit of the child; you cannot deny that being given for the separate use of the child, it is given to the child; therefore, the power in that respect is strictly followed. Then it is to be given to the child beneficially. How can any stranger, or any person claiming under the child, complain that a larger interest was given to the child than the child would take, if they had left it without that particular direction? It is very true the consequence of that is, that the husband does not take it, but the power is not to appoint so as to vest it in the husband, but to appoint to a child, and you may appoint in any way the law admits which is the most beneficial to the child. If it were now a new point, your Lordships would come to the same conclusion. But it is a point settled upon the best principle, and which leads to the best result, for it effects the intention of the donor, and enables the donee to give most beneficially to the object; and it enables the object to hold according to the ori-

\* 2 Vesey, Sen., 640.

† Ibid. 688.

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ginal donation, as against persons who otherwise would interfere with the right.

Now if that be a settled point, that you may so modify the property of a child, being a female, as to give it to the separate use, which has been decided, and if all that is done here by the mother Mrs. Bree, is only tantamount to a gift to the separate use, where is the objection to that which has been done in this case, which only makes the daughter, as to this property, just as much *sui juris* as if she were a male? We have not taken away nor diminished the property, nor the extent of the interest; we leave that just as we found it. A general disposition of property can only be considered a general power over property, and in all respects tantamount to a limitation of the fee.\* An instance of this sort occurs in the first statute relating to grants of annuities, in which there was an exception, that persons who had an estate in fee, &c., and made a grant that the grant should not be within the provisions of that act. A question arose where a man had a general power of appointment, whether that was a case within the exception; it was held that it was, because, although he had not a fee, yet he had that which was equal to a fee: he had the power of creating a fee, which was held to be within the provisions; a power which would reach over and embrace the whole interest, is equivalent to the fee itself. And this disposition is to all intents and purposes an absolute disposition to the child, being a daughter, to her own use only, so as to exclude the husband.

The case objected to respecting the power in bankruptcy, was properly decided. *Hurst v. Win-*

\* 17 Geo. 3. c. 26. §. 8.



*chelsea* \* proves, as it is argued, that if you appoint to your heir at law he takes by his better title: there never was a case more improperly decided. There was an appeal to the House of Lords, and there it was compromised, so that the ultimate decision was avoided; but it has no bearing upon this case; and is a most extraordinary decision; for how could any thing descend to the heir that was not vested in the ancestor? I have a power of appointment; there is no estate in me; I appoint to my heir at law, and my heir at law, according to the argument, takes by descent! How can he take any thing by descent which was never vested in me. The thing must vest in me before it descends; it must be in the ancestor before it can descend to the heir: there it never was in the ancestor at all. It is one thing to say, you have an entire power over it, and therefore can dispose of it; and another thing to say, because you have a power over the fee, therefore, it shall descend as if the fee itself was vested in you: that one is a necessary consequence of the other is a most illogical inference, drawn from premises which do not support it. The decision is untenable, and it has no bearing on this case. I have observed upon it only to put it out of the way.

The point made by the Appellant is this; that, as there is only one child, it is impossible to make any appointment at all to that child. The appointment has not restricted the dominion of the child, but enlarged it. Now, although you may appoint to a single child for this purpose, it does not follow you can for all pur-

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poses: that must depend on the words of the instrument; and it will be singular if the words of this instrument do not authorise the appointment. In this power, the gift in default of appointment is commensurate with the extent of the power, and the power itself is in words that admit of no doubt: "in trust for all and every the child and children of, &c. to be paid at such age or ages, time or times, and with such benefit of survivorship, and subject or otherwise, to, with, and under such conditions, restrictions, and limitations over," &c. What is there to confine these words—"conditions, restrictions, and limitations over" to the case of more than one child? what was there to prevent the parent, under this power, appointing to all and every the child and children, a child, if one child, children, if more than one child, at such ages or times, if more than one, and under such conditions and restrictions, and such limitations over, (that is, the limitations over being for the benefit of the others, the conditions and restrictions applying to any one of them) as she should appoint. If you spell these words, and look at them according to their most literal, strict, and grammatical import, you will find they authorise an appointment to one child, if only one child. Is there any reason why you should not do so? In default of appointment, the sons take at twenty-one, and the daughters take at twenty-one or marriage, and there are gifts over if there are no such children. Now suppose the case of a child, an only son, and that it becomes of great importance to give that only child a son an absolute interest, although under twenty-one: suppose, for example, some great advantage in the way of

establishing him in life, either in marriage or otherwise, that may render it exceedingly desirable to give him an absolute interest. Suppose he had married under twenty-one improvidently, or suppose he had had a child or two of his own, and there was a danger of the fund going over if he died under twenty-one, why should not the parent appoint to him? and this power authorises such appointment. According to the literal import of the words, taken in the strictest and most limited sense, it is perfectly clear you may appoint to one child at a different age or time from that which is provided in default of appointment. The whole property by the appointment in question is given to the one child, with a power of disposition to that child for the benefit of the child itself.

As to the cases of *Roe v. Dunt*, and *Doe v. Denny*, they only decide, that where there is a power to appoint a fund of this nature, you cannot limit or restrict the right of a child by giving it over, on a particular event, or to the use of your child or children as you shall appoint, and, in default of appointment, to them in fee, or to yourself, with a power of appointment, and so on, If you could limit to a child and then give it over, and the child died under twenty-one, you might be cutting down the interest of the child for your own benefit, and destroying its estate: such an appointment the law will not permit. In the case of *Doe v. Denny*, as reported in Sayer, p. 295., the words "*without issue*" are not inserted: they make a great difference; and in one of the reports it is said the wife could not alter the estate of the son.\* The fee simple, in default of appointment, is by the

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\* See Sugden on Powers, p. 457. (2d Ed.)

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power limited to the children; the donee may advance the child; may improve the child's interest; but cannot cut down the extent of interest which was intended by the donor. Any thing which would be for the benefit of the child, the donee might do; where it is real estate, you cannot give a child a power of disposition over it, or make it available before the time, although you may advance the testamentary power, because at an early age you may dispose of property by will, and may make it a vested interest where it was not a vested interest. Suppose, therefore, the power in this case had been general, as it was in *Doe v. Denny*, with a gift in default of appointment to children in fee at twenty-one; there is no doubt whatever the appointment in that case might be made to an only child absolute, without waiting till he was twenty-one; no such point was decided there; the only point decided was, that you must not diminish the quantity of interest: and in our case we have not diminished the quantity of interest, but have actually increased the benefit which the appointee, the object of the power, was to take.

In the other case of *Roe v. Dunt*, the estate was surrendered by the wife to the use of her son John Smith and Elizabeth his wife during their lives, and the life of the longer liver of them, and after the decease of the survivor of them to the child or children, whether male or female, of the said John Smith and Elizabeth his wife, in such proportion and proportions, and for such estate and estates, as the said John Smith and Elizabeth his wife, or the survivor of them, should, by any surrender or surrenders thereof, and ac-

according to the custom of the manor, or by his last or her last will and testament, direct, declare, limit, or appoint; and for want of such direction, declaration, limitation, or appointment, then to all and every the child and children of the said John Smith and Elizabeth his wife, and their heirs, equally to be divided between them as tenants in common, and not as joint tenants; and for want of such issue, then to the right heirs of the said John Smith for ever.\*

In each of these cases the parent took in default of issue of the children, and had an interest in making an appointment which would let in their own estate. In the first case, the wife, and in the second case, the husband, had an estate limited in default of issue; and in each case the appointment was made with the view of benefiting and enlarging, the very object of the appointment in each of those cases was to benefit and enlarge the remainder to the donee of the power himself; and it was held that the power did not warrant such an appointment; that the child was entitled to the whole estate in fee. What Lord C. J. Wilmot said with regard to the estate the party took in one of those cases is quite consistent with our argument, for he thought an estate tail might be limited. Now that is diminishing the interest, but still it would take in all the issue, and he thought it was within the power so far to lessen and modify the interest. It was intended, in each of those cases, to give the estate over in a case provided for by the appointment; in no case would it have gone over, if it had not been for the benefit of the wife in the one case, who made the appoint-

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\* See Sugden on Powers, *quâd supra*.

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ment, and for the benefit of the husband, in the other case. The Court said, no ; you are not to cut down the estate of the child ; you must not give the child less than an estate of inheritance ; you may give an estate tail, but you cannot give it over if the child dies under twenty-one because that is providing for yourself. According to the settlement, you are to appoint what you please, but in default of appointment the child is to take the fee, and if there is no child, then you are to take ; but, according to what you are doing under the power, you are taking care to make the fee go to yourself in case there is no child who attains twenty-one which is contrary to the terms of the settlement : and what the Court proceeded upon in *Roe* and *Dunt* was this, that if it had been a good appointment, and the child died under twenty-one, and left issue, that issue could not have taken. Looking at the consequence therefore of that appointment, it is a case which has not the most remote bearing upon the question we are now discussing ; the appointment in that case was directly contrary to the intention of the person creating the power, because, in default of appointment, the child was to take the fee : and, therefore, though he died under twenty-one, if he had issue that issue would take, or his general heir would take, if he had none. Those cases only show that you must not abuse the power, and do not prove that the power does not exist, though there be a single child.

*Campbell v. Sandys*, which has been cited for the Appellants, is also inapplicable to this case. In the first place, there was no decision on the point, for it was not necessary to decide it : no appointment was there made, and the only question

was, whether the gift over took effect: the authority is an *obiter dictum*, and there the power was clearly confined simply to distribution. There is nothing like the words in our case, "to be paid "at such age or ages, time or times, and with such "conditions and restrictions, &c. as they should "appoint;" and the question was not upon the validity of the appointment, but whether the gift over took effect or not.

As to the case of *Folkes v. Western*, it is not in point; and the judgment as cited, that the effect of the advancement to the child who died was to vest the whole in the survivor, is directly opposed, in all respects, to the cases of *Pitt v. Jackson*\*, and *Smith v. Lord Camelford*.† The Master of the Rolls was not aware of those decisions, and unfortunately that case of *Folkes v. Western* was not so well considered as it ought to have been. The other point was equally ill decided according to the authorities—that there were no words to create a tenancy in common; now the word "*between*," which was introduced, would create a tenancy in common. The word "*survivor*" related to a death in the testator's life-time; the point was settled in *Garland v. Thomas*‡: the case really has no bearing on the question now before your Lordships, because the Court considered that the effect of the advancement was entirely to get rid of that other child, and to vest the whole in the survivor; the point does not arise here, and if it did, that case certainly is not an authority.

The point decided in *Boyle v. the Bishop of*

\* 2 Ves. Jun. 698.

† 2 Bro. Ch. Rep. 51.

‡ 1 New. Rep.

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*Peterboro'*, decides on principle the case now before the House. In *Boyle v. the Bishop of Peterboro'*, after long consideration, Lord Thurlow held that if there was a power to appoint to children, and in default of appointment the children took vested interests, and if in the result there was only one child living, that one child could not take the whole in default of appointment, because, in default of appointment, that child, as the representative of the deceased children, would take whatever proportion was given to them; and, therefore, he determined, that by force of the power you cannot appoint to the representatives of a deceased child, but you may appoint the whole fund to the surviving child. In that case, in default of appointment, the fund went to the two; such was the intention: the law forbids you to appoint to the representatives of a deceased child. Lord Thurlow held, the power remained over the whole fund for the benefit of the surviving child; but why did he so hold? because, in default of appointment, the child could not take the entirety, and he was of opinion that it was intended that, under a gift by the power, you might give the whole to one child; for if there was not an intention to give the whole to one child, under the power, how could the power ever be exercised? And how could the actual existence of one child, and its subsequent death, enable you to exercise the power in favour of the surviving child, if the power by its original force did not authorise the appointment to the one child. If the power does not authorise the appointment to one child, an only object, there can be no appointment under it; now in *Boyle v. the Bishop of Peterboro'*, when the power was exercised,



there was but one object; and it was held you might appoint to an only child, because in no other way could the child take the whole; well then, the power does authorise an appointment of the whole to one, and yet in default of appointment it would not take the whole. But that is begging the question: it is not, because a subsequent accident renders it desirable, with a view to the parent's exercise of the power, that the power is then exerciseable, but it is only exerciseable because, according to the original force of the power, it authorises an appointment of the whole fund to an only child.

If it be argued, that it depends on the gift over, which enabled the exercise of the power, I say, first, that cannot be so, because the power is not more or less exerciseable, though it may be more or less desirable to exercise it, in consequence of the gift over; but it is not effective because it becomes desirable that you may exercise it, unless within the power you find a particular authority. They say, it is because the estate would go over to the representatives of one and the living object, in default of appointment, that you may exercise the power. As I understand this argument, they suppose the principle of the decision in *Boyle v. the Bishop of Peterboro'* to be, that in consequence of the child not taking so beneficial an interest in default of appointment, as the donee can give to the child under the power, provided the power will extend to it, therefore the power shall extend to it; that it shall be presumed to have been the intention, because under the power, the donee could give a more beneficial interest than the child would take in default of appointment. For the purpose of this

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argument I will suppose it is so : then I say, our case falls distinctly within that principle, for as in default of appointment, this child would take so as to give the property to the husband and not to herself, she being a married woman ; if the law enables you, under a power of appointment to a child, to appoint not so as to exclude the husband, but to leave the husband in her power, instead of putting her in his power, then she takes a more beneficial interest than she would otherwise take.

If, then, the principle which they extract from *Boyle v. the Bishop of Peterboro'* be the true one, it exactly applies itself to our case ; and, although I do not admit that to be the true principle, and I have suggested what I apprehend to be the true principle, yet I am willing to take it, for the sake of argument, as they lay it down, and then I submit that this case falls directly within the rule. *Boyle v. the Bishop of Peterboro'* has been very much canvassed in many cases ; and Lord Eldon, being very much pressed in the case of *Butcher v. Butcher*\* to disturb that case, said ; “ I certainly shall not disturb that case.” He adopted the law laid down in that case, and it has been followed ever since. No authority is more firmly established ; it was followed in *M'Gee v. M'Gee*.†

Suppose there were two children, both girls ; the parent, under the power, might appoint the share of each, to the separate use of each child : no lawyer would dispute the proposition, that if there were two daughters, not distributing the shares, but leaving them to take the whole between them, you might impress the interest they take with

\* 1 Ves. & Ben.

† 2 Mad. 368.

the character of separate estate. How can you distinguish that case from ours for this purpose? it is not restricting, cutting down, or taking away the interest, but it is a modification of the interest, which the law permits. The intention was to give a benefit to one child under the power, if the parent thinks fit, as well as to give a benefit to more than one child, if the parent thinks fit: if there had been two children, then they admit the surviving child might have taken the whole under the power, and might have taken it subject to this modification; but because there is only one child, they contend the child cannot take the whole with this modification. It would be singular if there was such a rule: how it might be in a case like *Campbell* and *Sandy's*, where they are expressly limited to shares, I need not enquire. That case is not now before your Lordships; but even if that were the case, and it were necessary to decide the point, they would find it very difficult to show that the parent's power could not come in aid of the child, being a woman, so as to protect her, not to cut down her interest, or give the fund over in an event not provided for in the settlement itself, but so to modify and impress the property she took under the settlement, as to enable her to dispose of it without being liable to the debts or controul of her husband. It is at least a very provident disposition; for it appears by the will which the daughter has made, she alludes in several places to the unfortunate differences between her and her husband, and the separation which existed between them; and she states that it is on account of the kindness and the protection she had received from her uncle, Mr. Hammersley, that she gave to him this

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part of her property, being the only property over which she had any power of disposition.

A settlement was made on the marriage of this young lady, by which a large sum of money was settled on the husband and wife and the issue of the marriage. This is not a case, therefore, in which the husband, on the marriage, did not make a bargain, and provide for himself, but this property was not included in that marriage settlement. It was left in the discretion of the parent; and under the power she thought proper to appoint it to the use of her daughter with a power of disposition; and the daughter thought proper, being separated from her husband, to exercise that power. If the husband can object to this, it must be on some strict rule of law; but there is no such rule. The case was in all respects rightly decided.

*The Lord Chancellor.* (At the conclusion of the argument) — This is a case of great importance, and the question arising upon it is by no means free from difficulty; if I had been aware of the nature of the question, I incline to think I should have asked for the assistance of some of the learned Judges.

The case of *Boyle v. the Bishop of Peterboro'* deserved great consideration: it is not very difficult to understand the ground on which Lord Thurlow puts the case, in the event which there happened, namely, children having been in existence, and one having died before the execution of the power, and it is very difficult to comprehend how the reasoning in that case can stand, with the negative proposition contended for by the appellant, that in the event of only one child ever being in existence, a power such

as that here given, which is, strictly speaking, the same power as the one in *Boyle v. the Bishop of Peterboro'*, could not have enured to enable that one child, through the power, and by the execution of the power, to have taken the whole.

On the other hand, it cannot be denied that the whole argument in *Boyle v. the Bishop of Peterboro'*, by which Lord Thurlow fortifies and supports his reasoning, might have been saved, if he had not proceeded upon the supposition, that should there have been but one child ever in *esse*, that one child could not have taken under an execution of the power: if he had assumed that the existence of one only child would not have disabled the donee to have executed the power, by giving a power over the fund to that child, or controlling that child in the execution of it. — If Lord Thurlow had assumed that proposition, it certainly would have rendered the argument less necessary, if not wholly superfluous, by which he fortifies himself in the proposition which he is maintaining,—that there having been two children in existence, one surviving might take under the execution of the power, and the gift over did not take effect.

The case of *Roe v. Dunt* requires very great consideration. There is no denying that, *primâ facie*, that is a decision inconsistent with the doctrine contended for in this case: It was stated by Mr. Solicitor General justly enough — there is annexed to the *dictum* of the Lord Chief Justice Wilmot a *quære*. That, I agree, is to be found in the Report, but it is very remarkable, that when that case is cited afterwards (and I mention this because it was not referred to at the bar) in

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*Robertson v. Hardcastle* \*, in the very able judgment which was given in that case by Mr. Justice Buller, in the course of which a reference is made to *Roe v. Dunt*, he takes no notice of the *quære*, and he seems to assume, without qualification, the doctrine laid down by Lord Chief Justice Wilmot, to be law for his words are these : “ In second Wilson, “ 337., there is an able opinion of Wilmot on this “ point, who said that he had known a case where “ there had been only one child, that that child, “ under such a power as this, had been made tenant “ for life, with a remainder in tail to its issue, but “ he much doubted whether it could legally be “ done.” Now, Mr. Justice Buller in commenting upon this, does not (as the reporter with his *quære* would lead one to suppose) hesitate, or doubt, or pause upon the question, but his observation only gives a commentary upon the meaning of the words, for he goes on to say as to the effect “ of this *dictum* of Wilmot “ manifestly pointing “ out that if a child to whom an estate is limited “ under a power is not born at the time when the “ power is created, he can only take an estate of “ inheritance : ” and then he goes on to quote *Alexander v. Alexander*, which has been referred to in this argument. *Robinson v. Hardcastle* was a case directed out of Chancery, for the opinion of the judges of the King’s Bench, at a time when the excellent custom prevailed in courts of law of giving reasons for their opinion, which custom is now more honoured in the breach than the observance, it being now the practice to deliver a certificate without stating the reasons, which leaves the

\* 2 Term Reports, p. 241.

Court asking for information, as I have often said, both at your Lordships' bar, and elsewhere, very much in the dark. The present Chief Justice is very much disposed to resort to the old practice. In the case cited, reasons were given by Mr. Justice Buller, both upon the first and second argument: but he was the only one of the Judges who appears by the report to have taken part in the discussion.

This is a case which is really of very great importance, because it is not in every such power, (very far from it,) that words are used which exclude all doubt, though a very slight addition would exclude all doubt; suppose it had been said, as it has been contended on the part of the appellant that it means — “or in default of such appointment, if there be but one child, then it shall “go to that child:” that would have removed all doubt whatever. And no doubt, this is so obvious a mode of removing all doubt that it is fair on the part of the respondents to avail themselves of that argument, making it, as it were, a topic for their construction, that if a very slight and simple addition would make the meaning quite clear, the not making that addition does certainly, *pro tanto*, go to show that the words have not that meaning. I don't very much rely upon that argument, except for the purpose of remarking, that, as we very often see powers framed as the power here is framed, without any words annexed to make it clear one way or the other, it becomes of great importance that deliberate attention should be paid to the case, and the more so, as the learned Counsel for the respondents, the defendants in the suit, I think, were

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stopped, and the learned Judge gave his opinion immediately upon the argument of the plaintiff's case; I certainly, from the consideration I have been able to give to the question, should so far differ from his Honor, as not to think it so clear as to have decided it immediately. It is a very short judgment; and, although the case of *Campbell v. Sandys* \* is mentioned, upon which several remarks arose, perhaps not very decisive either way, yet no argument was heard in answer to the argument which was urged with almost equal brevity on the part of the appellant, the then plaintiff. †

Upon the whole, therefore, for these reasons I wish to take further time to consider the question. The clearness of the case, I am by no means prepared to admit; it is the only part of the case on which I have made up my mind: I certainly do not coincide with his Honor, in thinking it so perfectly clear as not to require further time for consideration; and if, upon further consideration, I should think it necessary to trouble your Lordships with hearing it further argued, or to call upon one counsel on a side, to speak to it before the learned Judges, I shall crave your Lordships' permission to do so.

14th Aug.

*The Lord Chancellor.* — My Lords, this case of *Bray v. Malkin*, which came from the Court of Chancery, being an appeal from a decision of his Honor the Vice Chancellor, raised a question of considerable nicety, but I think upon reflection that there is not much doubt. The nature of the case, rather than any great difficulty that I experi-

\* 1 Scho. and Lef. 281.

† 3 Sim. p. 513.



ence in making up my mind to advise your Lordships upon the subject, has given rise to the intention I have of entering into the particulars of it, somewhat more at large than I otherwise might have done, in a case where I saw no reason to differ from the Court below.

Upon the marriage in November 1805, of Broad, Malkin and Elizabeth Spode, his intended wife the sum of 8,000*l.* was by deed of settlement vested in trustees, subject to the joint appointment of the husband and wife among the child or children of the marriage; (I need not go through that part of the power, as the question arises upon the several appointment of the wife, she surviving her husband, which was in exactly the same terms as the power of appointment given to the two :) the fund was to be “in trust for all and every, the child  
“ and children of the said Elizabeth Spode, by the  
“ said Broad Malkin to be begotten, in such shares  
“ and proportions, and to be paid at such age or ages,  
“ time or times, and with such benefit of survivor-  
“ ship, or otherwise, and subject to, with, and under  
“ such conditions, restrictions, and limitations over,  
“ the same to be always for the benefit of some  
“ one or more of such child or children as the said  
“ Elizabeth Spode alone, at any time or times, by  
“ any deed or deeds, writing or writings, either  
“ with or without power of revocation, to be by  
“ her sealed and delivered in the presence of and  
“ attested by two or more credible witnesses” (nothing arises on the form of the execution), “or  
“ by her last will or testament, or writing in the  
“ nature of her last will and testament, to be by  
“ her signed and published in the presence of,  
“ and be attested by the like number of witnesses,

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“shall direct, limit, or appoint.” It then goes on to provide for the case of neither a joint appointment by the husband and wife, nor a several appointment by her in execution of the power, she surviving her husband: in that case it provides for the fund of 8000*l.* going to the child and children, if more than one, share and share alike, at certain specified ages.

Mrs. Malkin survived her husband, and executed the power, she having but one child, Saba Eliza Malkin, in favour of that daughter. It was in effect an appointment; for she appointed under certain limitations to “such person or persons, “as she, the said Saba Eliza Bray, at any time or “times, and from time to time, during my life, or “after my decease, and notwithstanding her present “or future coverture,” should in manner therein directed, appoint. Saba Eliza, who was married to Mr. Bray, having appointed the fund in trust for her uncle William Hammersley, the question arises between the husband and the appointee, under Saba Eliza’s execution of the power, which question is in effect, Whether she took an absolute interest in the 8000*l.*, in which case it is in her husband—or whether she took under her mother’s power of appointment. If she did not take under her mother’s power of appointment *cadit quæstio*, for she had an absolute interest; if she took under her mother’s power of appointment, then the remaining question is, whether she well executed that power. The question raised is two fold; first, whether the power under the settlement of 1805, and which Elizabeth Malkin, the mother, assumed to execute, was a power of appointing, in the event which occurred, to one child, or only a power of distribution, that

is, to appoint among children, if more than one; whether it was a power of appointment, or whether only in effect, a power to ascertain the shares in which several individuals should respectively take: that is the principal question, and the only one encumbered with the least doubt; on the other I have no doubt, that is, whether or not the power was well executed.

To these questions I will address myself. In the first place, I am of opinion that the general intent of the parties to the settlement is clear, and that a greater frustration of that intent could hardly be imagined, than such a construction of the power as would go to deprive the donee of the right to execute that power in an event not at all unlikely, namely, that there should be but one child. Can it be supposed that any person would settle 8000*l.* on the children of the marriage, and those children being the objects and not others, would give the power to distribute among children without giving the power to appoint to one if there should be only one? It may be said, that case is provided for by the security clause, if I may so call it, which provides for the default of any execution, as in that case the single child would take, and if more children than one, then share and share alike; but this provision was to come into operation only from the necessity of the case, that is, if no appointment should be made. The appointment was something more than the conduit, through which to carry the intent of the settler into effect. The donee was to have the power of exercising her discretion, with "conditions, restrictions, and limitations over the same, so that it should be for the benefit of the child or children;" consequently, I infer that it was

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intended to put the children to a certain degree, as is the object of all such gifts of powers, under the control and at the discretion of the party exercising the power, that such donee might have an influence to prevent the children rebelling against parental authority ; that the fund being secured under the settlement, the parent should have the power, according to their conduct, of giving more to one than another, and if there should be but one, of making such conditions, restrictions, and limitations, as might suit the case. It is not to be supposed that any person of ordinary prudence would think of excluding the very case in which a parent is most likely to require the exercise of a discretion, a case in which there would be greatest occasion for some power of control, namely, the case of an only child. The confining this power, therefore, to the event of there being more children than one, is, in my opinion, contrary to the plain and manifest intention of the settler.

In the next place, I hold it to be very material in construing this instrument, to look to the very words of the power : there is more to be gathered from a nice inspection of the instrument itself, than from cases which have not always a clear application. A most learned Judge, the late Mr. Justice Holroyd, used to say that his rule was, never to apply a book-case to the matter before him, until he had searched into every corner of the instrument in question, for he had frequently found, on doing so, that there was something in the instrument which destroyed the application of the case on which the parties were relying. In the present instrument, the words of the clause which follow the authority to impose conditions, restrictions, and

limitations are material to be considered. These remarkable words occur, "The same to be always for the benefit of some one or more of such child or children." Now, if the construction contended for by the appellant be correct, that it was a power of distributing to several, and not of giving to one, it would have been thus framed: — "The same to be always for the benefit of such children," in the plural. So it would have been if the settler had not had in contemplation the case of one child, but having in contemplation the case of an appointment, in favour not only of several, but of one, the settler says, "the same" (that is, the "appointment") to be always for the benefit of some "one or more of such child or children." Even if it had been "one or more of such children," it might have been said these words "one or more" were used to prevent any argument arising on an illusory appointment; but it is not so; the word "child" is employed; and finding as we do, that word "child," it is perfectly clear that the case of a single child was contemplated, and that the appointment was to be executed for the benefit of one child, there being but one.

But this is not the most material argument arising upon the face of the instrument. I am aware it may be said, the settler was contemplating the case of a number of children, and that it was a power to give to one of those children; but there is an argument arising from another clause, that which provides for the contingency of the power not being executed: It is to be "then in trust for all and every the child and children of the said Elizabeth Spode, by the said Broad Malkin to be begotten, equally to be divided amongst them,

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“if more than one, share and share alike, and in ‘case there shall be but one such child, then in ‘trust for such one or only child.” Now, how could that be consistent with the supposition whereupon the construction for the appellant rests? According to that construction, the case of there being but one child is not provided for in the previous part of the settlement; it is *casus omissus*, and a power of appointment is only given in case of there being several children. But what sense is there, or what consistency with that view of the matter, in saying, “I give you the power of appointing among children, but I do not give you the power of appointing at all if there is only one,” and then adding, “but if you should fail to appoint, there being more than one, it shall go to them, share and share alike, and in case of there being but one, it shall go to that one.” That is totally inconsistent; it is making the second condition perfectly superfluous and unnecessary, because the first condition was sufficient, namely, the failure of appointing among the children. I consider these clauses to furnish a very strong answer to the Appellant’s argument. I consulted one of the Common Law Judges upon this question, and the instant I mentioned those clauses, he said that put an end to the question altogether.

I will simply observe, that the execution of the power is to be such, and under such conditions, restrictions, and limitations, that it shall be always for the benefit of some one or more of the child or children. It may be said a limitation is never for the benefit of the child; you had better give it in fee simple: but the maker of the deed seems

to have thought otherwise, and I conceive it may be well argued that it may be for the benefit of the children that the power of appointing should be executed with restrictions at the will of the donee.

I entirely accede to the argument made at the bar, in which it was contended that this question has been judicially determined; for I cannot distinguish in any way *Boyle v. The Bishop of Peterborough* from the present case. In that case, which was very much considered by Lord Thurlow, the will gave the personalty for life, then among all the children of the devisee, in such shares and manner, for such interests with such survivorship, and to vest at such time as the devisee for life should by deed or will appoint, and in default of appointment or as to so much as should remain unappointed to all equally, and if but one to that one, payable at twenty-one; nevertheless the shares of any attaining twenty-one in the life of the devisee for life to be vested. Lord Thurlow says \*, “The form of it is, if no appointment, and “for so much as is not completely appointed, to “assign to all and every the children, if more than “one, payable at twenty-one; if but one, then to “that one payable at twenty-one. If it had stopped “there, I must have looked upon it to be a provision at twenty-one after the death of the mother. “But it goes on by directing, that if any such “child shall attain twenty-one in the life of the “mother, his or her share shall be considered as a “vested interest, &c. I think that must relate to “unappointed shares, and the effect of that phrase

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\* 1 Ves. Jun., p. 309.

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“ is not to bind the shares to be appointed, not to  
 “ say they should vest at twenty-one, because the  
 “ power being during life, would itself specify  
 “ when they were to vest, and they might at any  
 “ period of life, without waiting for that period,  
 “ for there was no limitation upon her appoint-  
 “ ment, and her children need not be twenty-one  
 “ when they were appointees. Therefore, I think  
 “ this was intended to vest an interest only in de-  
 “ fault of appointment: that brings it to the ques-  
 “ tion, whether the power has not lost its oppor-  
 “ tunity of being exercised by the death of the  
 “ son, or whether there is a capacity of appointing  
 “ where only one child is left, and, if at all, whether  
 “ it must not be with reference to the clause which  
 “ provides for its going in case of no appointment.  
 “ The words breed the doubt. Where there are  
 “ only two children, the power by way of exercise  
 “ of discretion is totally gone by the death of one  
 “ before it is exercised, and it cannot be the same  
 “ power in point of extent as when meant to be a  
 “ distribution among several, for which it is neces-  
 “ sary there should be several. But this clause  
 “ made it proper for her to express that she did  
 “ intend her power to be executed. If there was  
 “ no appointment the consequence is, each would  
 “ be entitled to a moiety, because there was no  
 “ appointment. In respect of that clause she had  
 “ a power to appoint to one only, for though that  
 “ is not a distribution, it is an expression that it  
 “ shall go by appointment, and not transmit for  
 “ want of it.” The whole of this case in both  
 branches appears to me not distinguishable mate-  
 rially from the present; and it is perfectly cer-  
 tain Lord Thurlow could not have decided that



case, without deciding the principle on which the judgment now under appeal rests.

It was said that *Alexander v. Alexander*\*, touches a part of this case; *Fowkes v. Western* also was relied upon for the Appellant. Much doubt has been thrown upon that case at different times: my opinion is, that *Fowkes v. Western*, as far as it applies to this case, is rather against than for the purpose for which it was cited. But I rely upon the reasons which I have given independently of authorities, particularly the first, and above all that part of it on which I have thought it right to go into greater detail; and for these reasons it appears to me that the decree is right. I, therefore, move your Lordships, that the judgment of the Court below be affirmed. I do not propose to give any costs in this case. It appears that the money went to the uncle of the wife upon her death; the husband probably was advised that there was a serious question, whether he was not entitled to it; and I think, in these circumstances, your Lordships are not called upon to give costs.

Judgment affirmed.

\* 2 Vesey, Sen., p. 640.

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## ENGLAND.

(COURT OF CHANCERY.)

JOHN GRAHAM CAMPBELL, Esq.,  
 and DAME MARGARET HAY,  
 Widow, late MARGARET CAMP-  
 BELL, Spinster           -   -   - } *Appellants.*

WILLIAM GRAHAM, Esq., since de-  
 ceased           -   -   -   - } *Respondent.*

The said JOHN GRAHAM CAMPBELL, }  
 and MARGARET HAY           -   - } *Appellants.*

ERSKINE DOUGLASS SANDFORD, Esq. *Respondent.*

W. being resident in Jamaica, by his will, dated in 1768, gave to J. C. 1000*l.* Jamaica currency, and to M. H. and H. C. 500*l.* each of the same currency, to be paid to them when they should arrive at the age of sixteen years; and he desired that the legacies should be paid out of the money due to him on bonds from J. C. (the above named legatee) and his mother; and he appointed J. C. one of his executors.

By a codicil, dated in 1772, he gave to J. C. 1000*l.* currency of, &c., over and above what was given by the will. The testator, after the date of the will and codicil, left Jamaica, and became resident and died in Scotland in 1790. It was found by a report made in a suit for recovery of the legacies, that J. C. in October, 1773, was indebted to the testator in a sum of 2636*l.* sterling, which was secured by bond of that date, and in the usual form, and that in 1774, J. C. was indebted to the testator in the further sum of 700*l.*, also secured by bond. There was no other evidence of debt by bond or otherwise

owing by J. C. to the testator at the date of the will and codicil, except as appears by the statement of the will. In 1794, judgments were recovered against J. C. in Jamaica upon the bonds above mentioned; but no steps appeared to have been taken to enforce the judgments against J. C., who was not then domiciled in Jamaica. The legatees were born and remained domiciled in Jamaica, until after the death of the testator, when J. C. and M. H. left the island and acquired domicile in England or elsewhere. In 1791, administration with the will annexed was granted in Jamaica. J. C. died in 1801, and administration of his estate with his will annexed was granted in Jamaica to J. G. C. his son. In 1818, M. H. and H. C., in consideration of 25*l.* paid to each of them by J. G. C., and also of friendship and regard for him, being their nephew, and of assistance, &c., received from him, assigned to him their respective legacies of 500*l.* and 500*l.* with all interest due thereon.

In 1819, a bill was filed by W. G. the personal representative of W. against J. G. C. and others, to obtain payment of the debts owing upon the judgments out of the estate of J. C. In October, 1821, J. G. C. and M. H. filed a bill against W. G. to recover the legacies given by the will of W. Administration, with the will of W. annexed, was granted to W. G. by the Court of Probate in England, in November, 1821, before which time there had been no representative of the estate of W. in England. Held, upon the facts above stated, that it ought to be presumed that the legacies had been satisfied.

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**W**ILLIAM GRAHAM, of the Island of Jamaica, by his will, dated in June, 1768, amongst other things, gave and bequeathed to John Campbell, of, &c., in the said island, the sum of 1000*l.* of current money of Jamaica, and to Henrietta Campbell, and to the Appellant Margaret Hay, then Margaret Campbell, spinster, the sum of 500*l.* Jamaica currency, each, to be paid them when they should arrive at the age of sixteen years; and the said testator desired that the said legacies should be paid out of the money due to him on bonds from John Campbell (the legatee), and his mother; and he

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appointed his brother John Graham, Thomas Storer, John Campbell (the legatee), John Campbell of Salt Spring, and Aaron Moffatt, executors of his will. The testator, by a codicil to his will, dated the 13th of June, 1772, gave to John Campbell (the legatee named in the will) 1000*l.* current money of Jamaica, over and above what was mentioned in his will.

John Campbell the legatee was, in the month of October, 1773, indebted to the testator in the sum of 2636*l.* sterling money, and, for securing the payment thereof with interest, he executed and delivered a bond to the testator, bearing date the 28th of October, 1773, in the penal sum of 5272*l.* sterling, conditioned to be void on payment of 2626*l.* sterling, and interest, on the 28th of October, 1774. And in the month of March, 1774, John Campbell the legatee was indebted to the testator in the further sum of 700*l.* sterling, and for securing the re-payment thereof with interest, he executed and delivered another bond to the testator, dated the 25th of March, 1774, in the further penal sum of 1400*l.* sterling, conditioned to be void on payment by the said John Campbell of 700*l.* sterling, with interest, on the 25th of March, 1775.

The testator, sometime after the date of his codicil, quitted the island, and went to reside in Scotland, where he was domiciled at the time of his death, which happened on the 1st of December, 1790. John Campbell the legatee, and Henrietta Campbell, and the Appellant Dame Margaret Hay, who were brothers and sisters, were all born in the Island of Jamaica, and were domiciled there at the several dates of the said will and codicil, and

also at the time of the testator's death. The Appellant Margaret Hay, who was the youngest of the three legatees, attained her age of sixteen years in the year 1773. All the said three legatees quitted the island in the month of December, 1790, and none of them ever afterwards returned there.

Letters of administration, with the will and codicil annexed, were on the 15th of August, 1791, granted by the proper court in the Island of Jamaica to James Graham; but the said letters of administration were afterwards revoked, and thereupon letters of administration of the personal estate and effects of the testator left unadministered by James Graham, dated the 17th of May, 1793, with the will and codicil annexed, were granted by the proper court in the island to John Graham. John Graham, after obtaining the letters of administration, commenced two several actions at law in the courts of the said island against John Campbell the legatee upon the said two bonds; and on the 2d of June, 1794, John Graham, in one of the actions, recovered judgment against John Campbell for the sum of 5272*l.* British money, which in such judgment is stated to be of the value of 7380*l.* 16*s.* current money of Jamaica, debt (being the amount of the penalty of the first-mentioned bond), and 16*l.* 13*s.* 9*d.* costs of suit; and in the other of the actions he on the same day recovered a judgment for the sum of 1400*l.* British money, which in the judgment is stated to be of the value of 1960*l.* current money of Jamaica, debt (being the amount of the penalty of the second-mentioned bond), and 16*l.* 13*s.* 9*d.* costs of suit.

John Graham died soon after the date of the judgments, and thereupon letters of administration

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of the personal estate and effects of the said testator left unadministered by James Graham and John Graham, dated the 30th of August, 1794, with the will and codicil annexed, were granted by the proper court in the said island to David Home and James Graham. No steps were taken in the life-time of John Campbell the legatee to enforce payment of the money recovered by the judgments; and in the year 1801 John Campbell the legatee died, having by his will, dated the 19th of July, 1799, appointed Helen Campbell his wife, together with James Campbell, Anthony Morris Storer, and Peter Campbell, his executrix and executors; and soon after his death, Helen Campbell alone proved his will in the Prerogative Court of the Archbishop of Canterbury, and the executrix and executors named in the will having all declined to prove the same in the Island of Jamaica, letters of administration of the personal estate and effects of John Campbell, with the will annexed, were in the month of October, 1803, duly granted to the Appellant John Graham Campbell, the son of John Campbell, by the proper court in the said island, and Helen Campbell, and all the executors named in the will of John Campbell, having died before the month of May, 1810, except Peter Campbell, and he having renounced probate of the will, and being resident abroad, letters of administration of the personal estate and effects of John Campbell, left unadministered by Helen Campbell, dated in May, 1810, with the will annexed, were granted by the Prerogative Court of the Archbishop of Canterbury to the Appellant John Graham Campbell, who thereupon became the personal representative of John Campbell the legatee both in Jamaica and England.

David Home and James Graham, who in the year 1794 became the personal representatives in Jamaica of the testator William Graham, both died before the year 1818, and on the 7th of February 1818 letters of administration of the personal estate and effects of William Graham, left unadministered by James Graham, John Graham, David Home, and James Graham, the former administrators, with his will and codicil annexed, were granted to Wellwood Hyslop, of Kingston in Jamaica, by the proper court in the said island, and Wellwood Hyslop became the present personal representative of William Graham in the said island.

By an indenture dated the 14th of December, 1818, made between Henrietta Campbell, spinster, and the Appellant Dame Margaret Hay, of the same place, of the one part, and the Appellant John Graham Campbell, of the other part, after reciting among other things, that the legacies of 500*l.* and 500*l.*, together with the interest accrued due thereon, still remained due and owing to them, they the said Henrietta Campbell, and the appellant Dame Margaret Hay, in consideration of 25*l.* to each of them, paid by the appellant John Graham Campbell, and also in consideration of the friendship and regard which the said Henrietta Campbell, and the appellant Dame Margaret Hay respectively, had for the appellant John Graham Campbell (therein described to be their nephew), and of the benefits and friendly attention and assistance they had theretofore on various occasions received from the appellant John Graham Campbell, did bargain, sell, assign, transfer, and set over the said several legacies of 500*l.* and 500*l.* Jamaica currency, and all interest then accrued due

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bill stated, as to the said bonds and judgments, and the title of the Respondent to the same; and in case the Respondent should establish his title thereto, then the said last-named Appellant claimed a right to set off the several legacies and interest given by the will of William Graham.

On the 31st of October 1821, the Appellants, together with Henrietta Campbell, filed their cross bill, or original bill in the nature of a cross bill, in the High Court of Chancery, against the Respondent William Graham, thereby praying amongst other things that an account might be taken of what was due for principal and interest in respect of the said legacies of 1000*l.* and 1000*l.*, and 500*l.* and 500*l.* Jamaica currency, so then become vested in the Appellant John Graham Campbell as aforesaid: and that the Respondent William Graham might either admit assets of the testator William Graham, come to his hands sufficient to pay what should be found due for principal and interest in respect of the said legacies, and might pay the same accordingly, deducting what (if any thing) should be found due to him from the Appellant John Graham Campbell in respect of the matters alleged in the said bill of the said last-named Respondent; or that the said last-named Respondent might account in the usual manner for the personal estate and effects of the said testator William Graham come to his possession or power, and that the same might be applied in a due course of administration, and that thereout the Appellant John Graham Campbell might be paid what should be found justly due to him after making all just allowances.

On the 19th of November 1821, letters of administration of the personal estate and effects of the



testator William Graham, with his will and codicil annexed, were granted to the Respondent William Graham, by the Prerogative Court of Canterbury, whereby he became personal representative of the the testator William Graham, in England. On the 20th of November 1821, the cause instituted by the Respondent William Graham, was heard before the Vice-Chancellor, and by the decree then made, dated the 20th of November 1821, it was referred to Mr. Alexander, then one of the Masters of the Court, to inquire and state to the Court, whether the estate of John Campbell, was indebted to the Respondent William Graham, as administrator of the testator William Graham, in any and what sum of money on both or either of the judgments.

On the 24th of November, 1821, the Respondent William Graham filed his answer to the cross bill, and he thereby insisted, amongst other things, that the legacies ought to be considered as having been adeemed in consequence of there having been no bonds due from the said John Campbell and his mother to the testator William Graham, found at his decease, or that it ought to be presumed that the legacies had been paid. He further stated that he had possessed the personal estate of the said testator William Graham to some amount; but that the personal estate and the proceeds of the real estates of the testator William Graham were so blended together that he was unable to set forth, with any degree of precision, the amount of such personal estate, or whether or not the same was more than sufficient to pay the legacies and the interest due thereon.

In pursuance of the decree of the 20th of No-

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vember, 1821, Master Alexander made his report, dated the 22d of May, 1822, and thereby after stating the bonds and judgments, he found that the estate of the testator John Campbell was indebted to the estate of the testator William Graham, in the sum of 5272*l.*, upon and by virtue of the first of the judgments, besides 15*l.* 12*s.* 6*d.* for costs of suit, and in the further sum of 1400*l.* upon and by virtue of the second of the judgments, besides 15*l.* 12*s.* 6*d.* for costs of suit, which four several sums amount together to the sum of 6703*l.* 5*s.* sterling. To this report the Respondent took an exception, for that the Master ought to have certified that there was due to him as administrator, in addition to the sums above-mentioned, interest at the rate of 6*l.* per cent. per annum upon the two principal sums of 5272*l.* and 1400*l.* from the 2d of June, 1794, down to the date of the report.

The cause *Graham v. Campbell* was heard upon this exception to the said report, and for further directions on the 25th of July, 1822, before the Vice-Chancellor; and a decretal order was made on that day, whereby the exception was overruled, and it was referred to the Master, among other things, to take an account of what was due to the Respondent William Graham, and all other the creditors of John Campbell, deceased, and to take the usual accounts of the personal estate come to the hands of the Appellant John Graham Campbell, and also to take an account of the rents and profits of the real estates of John Campbell, deceased, received by the Appellant John Graham Campbell.

On the 25th of February, 1823, the cause of *Campbell v. Graham* was heard before the Vice-Chancellor, when a decree was made therein, by

which it was referred to the Master to inquire whether the legacies of 1000*l.* and 1000*l.*, 500*l.* and 500*l.* or any of them, or any and what part thereof respectively were then due and payable; and the Master was to be at liberty to state any matter specially to the Court at the request of either party; and in case the Master should find that the several legacies, or any of them, or any part thereof, were then due and payable, then the Master was to take an account of what was due for principal and interest in respect of such legacies respectively. Before any report was made pursuant to the last-mentioned decree Henrietta Campbell died.

In pursuance of this decree Mr. Wingfield, made his report, dated the 11th of April, 1829; and he thereby found the principal facts before stated, and, amongst other things, that the legacies of 1000*l.* 1000*l.* 500*l.* and 500*l.* Jamaica currency, together with all interest accrued thereon, then remained due and payable, and wholly unsatisfied. The Master certified that there was then due for principal of the said two legacies of 1000*l.* each, Jamaica currency, the principal sum of 1428*l.* 11*s.* 5*d.* sterling, and for interest thereon to the 11th day of April, 1829, the sum of 2067*l.* 5*s.* 11*d.*; and he further found that there was due for principal of the said two legacies of 500*l.* each, the principal sum of 714*l.* 5*s.* 8½*d.* sterling, and for interest thereon to the 11th day of April, 1829, the further sum of 1033*l.* 12*s.* 11*d.* sterling, the said several sums making together the sum of 5243*l.* 15*s.* 11*d.* which was the total sum which he found to be due to the Appellant John Graham Campbell in respect of the said several legacies. And the Master further cer-

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tified, that the Respondent William Graham had stated and charged before him, that inasmuch as no such bonds from John Campbell, deceased, and his mother, as are mentioned by the testator William Graham in his will, were found to be in existence at the time of his death, the said legacies ought to be considered as having been adeemed, or if not adeemed, that they ought to be presumed to have been paid and satisfied, or otherwise that no interest was due upon the said several legacies, and that the principal sum due in respect thereof ought to be set off and deducted from the amount due to the Respondent William Graham upon the said bonds and judgments, as on the 1st day of December, 1791, being one year after the death of the said testator William Graham; and that interest should thereafter be calculated upon the amount remaining due upon the said bonds and judgments after such deduction, until the same should amount to the said sum of 6703*l.* 5*s.*; and that the Court having decided (upon the said exception taken as aforesaid to the said report made in the above-mentioned cause of *Graham v. Campbell*) that no interest should be calculated beyond that amount, in respect that the said judgments were for the penalties of the said bonds, the said sum of 6703*l.* 5*s.* would still remain due and owing to him the Respondent William Graham, upon and by virtue of the said judgments, after deducting the amount of the said legacies, at the end of one year after the death of the said testator William Graham, in manner above mentioned; and the Master thereby further certified, that upon consideration of the circumstances thereinbefore set forth, and of the evidence laid before him, it did not appear to him that it ought

to be found that the said legacies were to be considered as having been adeemed, or that they were paid and satisfied, or that no interest was due upon the said legacies, or that the principal sums thereof should be set off and deducted from the amount due to the Respondent William Graham, upon the said bonds and judgments, as on the said 1st day of December, 1791, and the interest thereafter calculated upon the amount which would then remain due upon the said bonds and judgments after such deduction until the same should amount to 6708*l.* 5*s.*

To this report the Respondent William Graham took six exceptions : —

First Exception. For that the said Master in and by his general report had certified that under and by virtue of the testator's will and codicil there is due to the Plaintiff John Graham Campbell as administrator of John Campbell, deceased, the principal sum of 1428*l.* 11*s.* 5*d.* sterling, for two several legacies of 1000*l.* and 1000*l.* Jamaica currency in the said report mentioned, together with the further sum of 2067*l.* 5*s.* 11*d.* sterling, for interest thereon from the 1st day of December, 1791, being one year after the testator's death, up to the 11th of April, 1829, the date of the said report, whereas the said Master ought to have certified that there is not any thing due to the said complainant in respect of the said two legacies or either of them.

Second Exception. For that the said Master hath in and by the said report certified that under and by virtue of the same will, and of an indenture in the said report mentioned ; there is also due to the said complainant John Graham Campbell in his own right, the principal sum of 714*l.* 5*s.* 8½*d.* sterling,

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for the two several legacies of 500*l.* Jamaica currency in the said report also mentioned, together with the further sum of 1033*l.* 12*s.* 11*d.* sterling, for interest thereon from the said 1st day of December, 1791, the said several sums of 1428*l.* 11*s.* 5*d.* 2067*l.* 5*s.* 11*d.* 714*l.* 5*s.* 8*d.* and 1033*l.* 12*s.* 11*d.*, making together the sum of 5243*l.* 15*s.* 11*d.* sterling, whereas the said Master ought to have certified that there is not any thing due to the said complainant in respect of the said two legacies or either of them.

Third Exception. For that the said Master hath certified that it did not appear to him that it ought to be found that the said legacies are to be considered as having been adeemed, or that they were paid and satisfied, whereas the said master ought to have found that the said legacies are to be considered adeemed, or otherwise that it ought to be presumed that the same were paid and satisfied.

Fourth Exception. For that the said Master hath in and by the said report certified that it did not appear to to him that it ought to be found that no interest is due upon the said legacies, or that the principal sums thereof should be set off and deducted from the amount due to the said Defendant upon the bonds and judgments mentioned in the said report as on the 1st day of December 1791, and the interest thereafter calculated upon the amount which would then remain upon the said bonds and judgments after such deduction made until the same should amount to the sum of 6703*l.* 5*s.* mentioned in the said report; nor did it appear to him that although interest is calculated upon the amount of the said legacies, interest also should be in like manner calculated upon the said sum of

6703*l.* 5*s.* down to the time when the amount of the legacies shall be deducted therefrom, whereas the said Master ought to have certified that the principal of the said legacies of 1000*l.*, and 1000*l.* should be set off and deducted from the amount due to the said Defendant, upon the said bonds and judgments as in the said report mentioned as on the 1st day of December 1791, and that interest should thereafter be calculated upon the amount remaining due upon the bonds and judgments after such deduction, until the same shall amount to the sum of 6703*l.* 5*s.*

Fifth Exception. For that the said Master hath in and by his said report certified that it did not appear to him that it ought to be found that no interest is due upon the said legacies, or that the principal sums thereof should be set off and deducted from the amount due to the said Defendant upon the bonds and judgment, mentioned on the said report as on the 1st of December 1791, and the interest thereafter calculated upon the amount which would then remain due upon the said bonds and judgments after such deduction, until the same should amount to the sum of 6703*l.* 5*s.* mentioned in the said report; nor did it appear to him, that although interest is calculated upon the amount of the said legacies, interest should also be in like manner calculated upon the said sum of 6703*l.* 5*s.* down to the time when the amount of the said legacies shall be deducted therefrom, whereas the said Master ought to have certified that the principal of the said legacies of 500*l.* and 500*l.* should be set off and deducted from the amount due to the said Defendant upon the said bonds and judgment as on the 1st of December 1791, and that

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interest should thereafter be calculated upon the amount remaining due upon the said bonds and judgments after such deductions, until the same shall amount to the said sum of 6703*l.* 5*s.*

Sixth Exception. For that the said Master, in and by his said general report, hath calculated and ascertained the amount or value in sterling money of the four several legacies of 1000*l.*, 1000*l.*, 500*l.* and 500*l.* Jamaica currency, and the interest thereon respectively, according to the par rate of exchange between Jamaica and England, and hath accordingly found that there is now due to the said John Graham Campbell for the aforesaid several legacies of 1000*l.* and 1000*l.* Jamaica currency, the principal sum of sterling money of 1428*l.* 11*s.* 5*d.*, and for interest thereon at the rate of 4*l.* per cent. per annum, the sum of 2067*l.* 5*s.* 11*d.* sterling, and that there is also due to the said John Graham Campbell for the said two several legacies of 500*l.* and 500*l.* Jamaica currency, the principal sum in sterling money of 714*l.* 5*s.* 8½*d.* and for interest thereon at the rate of 4*l.* per cent. per annum, the sum of 1033*l.* 12*s.* 11*d.* sterling, whereas the said Master ought to have calculated and ascertained the amount or value in sterling money of the said several legacies and the interest thereon (if the said legacies and any interest thereon shall be found payable) at the rate or premium of what is called 22½ per cent. on the sterling value of bills of exchange drawn in Jamaica upon persons in England, which was the premium on such bills according to the last advices received from Jamaica respecting such premium; and that accordingly the sum of 583*l.* 1*s.* 9½*d.* is the sum which should be paid in London as the value of, and to discharge



a sum of 1000*l.* Jamaica currency, whereby the sums of 1166*l.* 3*s.* 7*d.* and 1688*l.* 10*s.* 6*d.*, 589*l.* 1*s.* 9½*d.*, and 844*l.* 5*s.* 3*d.* only, and not the above-mentioned sums of 1428*l.* 11*s.* 5*d.*, 2067*l.* 5*s.* 11*d.*, 714*l.* 5*s.* 8½*d.*, and 1039*l.* 12*s.* 11*d.* would be due in respect of the principal and interest of the said legacies.

The cause was heard on further directions, and on the said exceptions in March 1830, before the Master of the Rolls, who ordered that the first, second, third, fifth and sixth exceptions to the Master's report should be overruled, and that the fourth exception should be allowed: and it was by the said order declared that the amount of the two several legacies of 1000*l.* and 1000*l.* Jamaica currency in the said Master's report, certified to be due to the Appellant John Graham Campbell as administrator of John Campbell, deceased, was to be considered as giving to the legatee a right of retainer as on the 1st day of December 1791, being the end of one year after the death of the said William Graham the testator, to the amount of the said two legacies, out of the debt due by the said John Campbell, deceased, to the said testator William Graham, upon the said bonds on which the said judgments were obtained, and to be considered as applied, first, in payment of the interest, and the remainder (if any) in payment of the principal of the said debt: and that the account between the parties to the said suit was to be computed upon the principle of such retainer, and that it should be referred back to the Master to inquire and ascertain what was due upon the said judgments on the 2d day of June, 1794, when they were obtained, having regard to the declaration thereinbefore con-

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Sixth Exception. For that the said Master, in and by his said general report, hath calculated and ascertained the amount or value in sterling money of the four several legacies of 1000*l.*, 1000*l.*, 500*l.* and 500*l.* Jamaica currency, and the interest thereon respectively, according to the par rate of exchange between Jamaica and England, and hath accordingly found that there is now due to the said John Graham Campbell for the aforesaid several legacies of 1000*l.* and 1000*l.* Jamaica currency, the principal sum of sterling money of 1428*l.* 11*s.* 5*d.*, and for interest thereon at the rate of 4*l.* per cent. per annum, the sum of 2067*l.* 5*s.* 11*d.* sterling, and that there is also due to the said John Graham Campbell for the said two several legacies of 500*l.* and 500*l.* Jamaica currency, the principal sum in sterling money of 714*l.* 5*s.* 8½*d.* and for interest thereon at the rate of 4*l.* per cent. per annum, the sum of 1033*l.* 12*s.* 11*d.* sterling, whereas the said Master ought to have calculated and ascertained the amount or value in sterling money of the said several legacies and the interest thereon (if the said legacies and any interest thereon shall be found payable) at the rate or premium of what is called 22½ per cent. on the sterling value of bills of exchange drawn in Jamaica upon persons in England, which was the premium on such bills according to the last advices received from Jamaica respecting such premium; and that accordingly the sum of 583*l.* 1*s.* 9½*d.* is the sum which should be paid in London as the value of, and to discharge

a sum of 1000*l.* Jamaica currency, whereby the sums of 1166*l.* 3*s.* 7*d.* and 1688*l.* 10*s.* 6*d.*, 583*l.* 1*s.* 9½*d.*, and 844*l.* 5*s.* 3*d.* only, and not the above-mentioned sums of 1428*l.* 11*s.* 5*d.*, 2067*l.* 5*s.* 11*d.*, 714*l.* 5*s.* 8½*d.*, and 1083*l.* 12*s.* 11*d.* would be due in respect of the principal and interest of the said legacies.

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tained as to the right of retainer in respect of the said two legacies of 1000*l.* and 1000*l.* Jamaica currency: and that the said Master was to compute interest at the rate of 5*l.* per cent. per annum, on what he should so find to be due on the said 2d day of June, 1794, upon the said judgments from the said 2d day of June 1794, until the amount due on the said judgments, together with the cost therein mentioned should have reached the sum of 6703*l.* 5*s.* sterling, being the amount of the penalties of the said bonds and of the said costs mentioned in the said judgments: and the said Master was to compute subsequent interest at the rate of 4*l.* per cent. per annum on the two legacies of 500*l.* and 500*l.* Jamaica currency in the said report mentioned, from the time down to which he had already computed interest thereon, and that the amount which the said Master should find to be due for principal and interest of the said two legacies of 500*l.* and 500*l.* Jamaica currency should be set off against the said sum of 6703*l.* 5*s.* the amount of the penalties of the said bonds and costs as aforesaid, and the remainder of the said sum of 6703*l.* 5*s.* after such set off as aforesaid should be considered and taken as the debt due by the estate of the said John Campbell, deceased, to the estate of the said testator William Graham, upon the said judgments after such retainer and set off, in satisfaction of the said four legacies of 1000*l.* 1000*l.* 500*l.* and 500*l.* as thereinbefore directed.

From this order, the Appellant John Graham Campbell presented his petition of appeal to the Lord Chancellor, complaining of the allowance of the fourth exception, and the directions consequential thereon, and praying to have the order of

the 8th day of March 1830, varied accordingly. The Respondent William Graham also presented his petition of appeal to the Lord Chancellor from the said order of the 8th day of March 1830, stating therein as his grounds of complaint, that the second and sixth exceptions ought to have been allowed : and that it ought to have been declared that there was not any thing due in respect of the two legacies of 500*l.* and 500*l.*, or either of them, but that the same must be presumed to have been paid and satisfied ; or if the same were not to be presumed to have been paid and satisfied, then that the amount or value thereof, and of the interest thereon, ought to have been calculated and ascertained at the rate of what is called 22½ per cent. on the sterling value of bills of exchange drawn in Jamaica upon persons in England, which was the premium upon such bills according to the last advices received from Jamaica previous to the date of the said Master's report.

Both the petitions of appeal were heard before the Lord Chancellor in 1831 ; and on the 23d of August 1831, his Lordship made an order on the petition of the Appellant, that the decretal order, dated the 8th day of March 1830, should be affirmed : and on the petition of appeal of the Respondent William Graham, it was declared that the two legacies of 500*l.* and 500*l.* Jamaica currency must be presumed to have been paid and satisfied, and the said order of the 8th of March 1830, as to the said legacies of 500*l.* and 500*l.* Jamaica currency and interest, was reversed : and it was ordered that the sum of 1780*l.* 5*s.* 6*d.* being the amount which was under or by virtue of the said last-mentioned order set off, or deducted by the

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Master by his report, bearing date the 29th day of May 1830, for principal and interest of the said last-mentioned legacies from the debt therein appearing to be due by the estate of the said John Campbell, deceased, to the estate of the said testator William Graham, was to be considered and taken as further part of the said debt.

From this order of the Lord Chancellor this appeal was presented ; but before any further proceedings were had, the Respondent William Graham died, and thereupon letters of administration of the personal estate and effects of the testator William Graham, left unadministered by the Respondent William Graham, with the said will and codicils annexed, were granted to the Respondent Erskine Douglas Sandford by the Prerogative Court of the Archbishop of Canterbury, and the last-named Respondent thereby became the personal representative of the testator William Graham.

On the 19th of March, 1832, the last-named Respondent presented his petition to the House, praying that the appeal might be revived against him as the personal representative of the testator William Graham, in the place and stead of the late Respondent William Graham, which was ordered accordingly.

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For the Appellant, Sir *J. Scarlett* and Mr. *Tinney*.

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Time in this case is no bar to the claim. No bonds were in existence at the date of the will ; and if it applies to funds upon a future contemplated loan it must mean that the legacies should be paid when the bonds were paid.

The delay of the claim is accounted for by the absence of the parties. From 1791 they were in

England, where there were no assets and no administration until 1821, when it was taken only for the purpose of recovering the debt owing upon the bonds. These circumstances rebut the presumption of payment. As to the legacies assigned to the Appellant the chief consideration must have been natural love and affection. There is better ground to presume the debt satisfied than the legacies. The question as to rate of exchange cannot arise. The funds and the parties are here, and the legacies are not charged upon funds in Jamaica. In *Jones v. Turberville* \*, where satisfaction was presumed, the bill was filed by the second husband of the legatee, a strong ground for the presumption, which clearly distinguishes that case as peculiar. In *Pickering v. Lord Stamford* † the claim was by next of kin ; there was a lapse of 35 years, yet the claim was established and an account decreed. In that case many of the parties were dead ; here they are alive and can be examined. No receipts are produced nor is it pretended that any were ever given. These facts are sufficient to rebut or rather exclude presumption of payment. A Court of Equity is not bound by the rule of the Statute of Limitations, and adopting the principle it must adopt the exceptions of the statute.

This is not the case of a peremptory bar by statute or any positive rule of law, but a question of presumption from length of time, which may be rebutted by circumstances accounting for delay of claim. In this case there was a doubt as to legacy itself being made payable out of bonds not proved to be in existence—at all

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\* 2 Ves. Jun. 11.

† 2 Ves. 581. See *Astrey's case*, 2 Freem. 55.

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events payable out of a debt, the claimants being absent from the place where the assets were distributable, there being no representative in Europe who might be sued, and the effect of a suit being to bring a counter-demand upon the nephew of the claimants, whom they desired to protect: the one party being equally negligent in suing upon the judgments as the other in suing for the legacy. Under these peculiar circumstances, a delay of suit cannot reasonably ground a presumption of payment.

This is not the case of a peremptory bar by law, but a question of presumption, which is rebutted by the state of circumstances. It is not a case of creditors, who might have sued in Jamaica; but of legacies payable out of bond debts, claimable against the legatee, and who was out of the jurisdiction where alone the assets and the representative was to be found. In cases of presumption equity will consider all the probabilities. Here are ample grounds for delay; and activity of suit by legatees against executors is rather to be deprecated than encouraged. The assignment of 1818 must have been made under a conviction that the legacies were not paid. It was made by aunts to their nephew, not to cheat him of the consideration money, knowing the legacies to have been paid, but to operate as a set-off against the judgments and protect him. Under all the circumstances an omission to sue can never be held to furnish a presumption of payment.

Upon the question of currency there is no appeal; but if the legacies are held not to be adeemed and to be payable, there must be a further inquiry upon that point.

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For the Respondents, Mr. *Knight* and Mr. *Simpkinson*.

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The question of currency cannot be disposed of here. As to presumption, whatever its nature may be, it must be admitted that it is applicable to a legacy. The rule is settled, that upon default of claim for twenty years without excuse, courts of equity presume satisfaction.\* The limit of time is fixed, and nothing farther can be allowed. Courts of equity have acted upon presumption after six or ten years' laches. Here is a presumption of payment against the Plaintiff, grounded upon a lapse of thirty years, and the right is gone unless there are circumstances to rebut that presumption. It appearing that the testator died in 1790, the burden is thrown upon the claimant to get rid of the effect of delay. Here the youngest of the ladies attained the age of sixteen in the year 1774. She was therefore thirty-two at the time of the testator's death. Both of the ladies who were the legatees were born in Jamaica, and there domiciled at the death of the testator, in the country of the testator, of the will, the legacy, and of the assets.

The testator died in Scotland, but possessed of considerable property in Jamaica. The will was proved in Jamaica in 1791. It is assumed in argument that both ladies had left Jamaica before the death of the testator; but there is no proof of that being the fact, and if it be left in doubt, the presumption is against those on whom the burden lies.

When John Campbell left Jamaica does not appear, except that it is stated to have been in or about the year 1790, which might be in 1791;

\* *Montresor v. Williams*. Roper on Legacies by White 792.; and see 3 & 4 W. 4. c. 32.

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but it was for the Appellants to make this clear: they should not leave it obscure; and it is purposely left in doubt, by the phrase, "in or about 1790." The assignment is a very suspicious circumstance: it is dated on the 14th of December, 1818, just at time when the claim on John Campbell for the bond was in agitation: The bill for the bond debts was in August, 1819. It is probable that John Campbell, by means of the assignment, wanted to furnish himself with a defence. As to consideration, if there be any, it is usually endorsed upon the deed. Where is it? The sum of 25*l.* was probably inserted merely in order to bolster up the case.

*The Lord Chancellor.*—They might as well have put in 250*l.*

*Mr. Knight.*—The stamp would then have been a consideration. Supposing the fact proved, that the parties were not in Jamaica, what should prevent their suing them for their legacies? It is said that by the law of Jamaica they are not bound; but there is no evidence of such a law. The excuse for not proceeding is, that there was no representative in England, but the domicile of the assets was in Jamaica, and they might have obtained administration here. Courts of Equity do not act by analogy to the statute of limitations, but by independent rules of their own, which existed long before the statute, and were adopted for the repression of stale demands and to maintain the peace of families. If the statute furnished the rule, cases by analogy to writs of right would extend the equity to sixty years. But twenty years has been established as a positive rule, lately applied and confirmed in *Cholmondeley v. Clinton*.\* The doctrine

\* 4 Bli. O. S., p. 1.

and principle of the rule appears in many cases : *Smith v. Clay*\*, *Chalmer v. Bradley*†, *Jones v. Turberville*‡, *Hercy v. Dinwoody*. § One authority, *Foster v. Hodgson*||, not cited below, shews that the defence against a claim from lapse of time may be made by demurrer. Here the demand is made after thirty years, and there is no satisfactory explanation.

The judgment in the court below is founded upon conjectures. As to one fact the Master of the Rolls says, "it may not unnaturally be presumed," and that it "seems very possible that there were "no assets forthcoming." These facts are material to found the judgment, and are not proved but assumed.

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The *Lord Chancellor*, in the course, and at the conclusion of the argument, made the following observations : —

The main question before me was that of set-off. The other questions turn upon presumption and satisfaction. The question—in what currency the legacy was to be paid—I was not called upon to decide, as I held it was to be paid in no currency. I had no doubt upon the principles of law ; the only doubt was upon their application to the facts of the case. What I have now chiefly to consider is, whether or not there was in existence during the time in question a party, *valens agere*, as the Civilians say, so as to ground the argument of acquiescence.

With respect to the boundary line as to lapse of time it is various in the cases which have occurred in equity. Can I say, according to the authorities,

\* 3 B. & C. C. 639. ; Amb. 645.

† 2 Ves. J. 11.

§ Ibid. 87.

† 1 J. & W. 63.

|| 19 Ves. 185.

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that twenty-seven years' default of claim is not sufficient to ground the presumption? Courts have in other cases adopted periods for presuming satisfaction, and for otherwise excluding claims. A period was fixed by courts of law in the cases of *quo warranto*: and the same was afterwards adopted in Mr. Fox's bill.\* The period of limitation which the statute of W. 3.† had fixed for judgments, was by the courts applied to other specialties, viz. bonds; though that number of years was not always required; for Lord Mansfield left a case to the jury after eighteen years. But no doubt twenty years was the common period, as it now is the statutory time.

The first point, as to set-off, is out of the question. The point as to currency is not a subject of appeal. The only remaining question is, whether a lapse of twenty-seven years, under the circumstances of this case, is sufficient to warrant a court of equity to presume satisfaction. The delay of claim does not appear to be sufficiently accounted for. It is argued that in a principal authority on this point forty years was the time relied on. There is no limit of time rigidly fixed. Twenty years' delay of claim unexplained has generally been considered as the limit. This question of time, as regards the facts of this case, is the only one which has raised doubts in my mind; and those doubts have been increased by the powerful arguments of the counsel for the Appellant; and upon that I will take time to consider.

The late act has settled periods of limitation in other cases, but there is none fixed with respect to a legacy. So far from leaning with favour to the

\* 32 Geo. 3. c. 58.

† 10 & 11 W. 3. c. 14.

judgment, I feel every disposition to correct it, if it had laid down the law erroneously, for I should be sorry to be recorded as one who had tainted the pure stream of judicial decision, and introduced error into the law. But the learned counsel for the Appellants have abandoned all objection to the principles of law assumed by the judgment, and confined themselves entirely to the question of fact.

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*The Lord Chancellor.*—This was originally an Aug. 12.  
appeal from a judgment of the Master of the Rolls on three exceptions to the Master's report. Upon the matter of the first exception, respecting the mode of taking the account and the set-off, and upon the third exception as to the currency, I saw no reason upon argument to differ from him. The second exception, which raised the question of presumption of payment, was the most material. As to that question I differed from the Master of the Rolls upon the ground, not of fact, but of law, founded upon the lapse of time without claim, which the Master of the Rolls held to be no bar to the claim. That length of time constitutes a bar, in the legal sense of the word, I never considered; but that in a question of equity it is to be taken into the account, that the laches of the claimant must prejudice his claim; that a party who, by the delay, has been lulled into a belief that no claim exists, and has arranged his affairs upon that supposition is to be protected, are propositions and doctrines of equity so clear as not to admit of doubt, and to be applied with less scruple in this case where the claimant is not the original legatee, but the assignee of a legacy which he bought for a small fraction of four or five

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per cent. of its value. Since the case has been argued I have referred to all the authorities, and satisfied myself on all the questions raised in the argument. I have resorted to my note of the case argued before me in the Court of Chancery, and the printed report, and have now a distinct recollection that my opinion was fully made up, both on the fact and the law. If upon reconsideration of the doctrines of equity applicable to the case I could have convinced myself that I had erred in the opinion which I then formed, I should have been most desirous to correct an error which I should have been the cause of introducing into the law; but the doctrines are not now questioned by the Appellant.

In these circumstances I submit to your Lordships that the judgment below ought to be affirmed. I do not recommend that the costs of the appeal should be given, except as to the part of the exception relating to the questions abandoned at the bar. If the costs on that exception can be separated and ascertained, I should be disposed to give those costs.

Judgment affirmed.

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## ENGLAND.

(KING'S BENCH AND EXCHEQUER CHAMBER.)

WILLIAM MARSH, JOSIAS HENRY  
STRACEY, and GEORGE EDWARD } *Plaintiffs.*  
GRAHAM - - - - - }

ANN KEATING - - - - - *Defendant.*

K., a customer of M. & Co., Bankers, with whom she kept an account, gave a power of attorney to the partners to receive the dividends upon her stock in the government securities; under this power the dividends were at different times received by M. and F., two of the partners. In 1824, under a power of attorney forged by F., 9000*l.*, three per cent. reduced annuities, part of the stock of K., was sold for 6000*l.* 13*s.* 2*d.*, and transferred in the Bank books to T., who had other stock of the same kind. Half of the commission upon this transfer was paid by the broker to M. and Co. The proceeds of the stock thus sold were paid into the house of M. S. and Co. (city bankers) to the account of M. and Co.; and entered in a pass-book, which from time to time was sent to M. and Co. After the transfer several balances were struck between the city bankers and M. and Co. In 1825, F. being indicted for other forgeries, was convicted and executed. No indictment was ever preferred against him for the forgery in question. Upon these facts, found by special verdict, it was held that K., in an action brought against M. and the surviving partners of the firm of M. and Co. for the proceeds of the sale of the stock, as money had and received to her use, was entitled to recover.

THIS was a writ of error, brought in the names of William Marsh, Josias Henry Stracey, and

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George Edward Graham (the Defendants below), on the affirmance by the Court of Exchequer Chamber of a judgment in the Court of King's Bench, in an action by Ann Keating (the Plaintiff below), against the said William Marsh, Josias Henry Stracey, and George Edward Graham, for money had and received by the said William Marsh, Josias Henry Stracey, and George Edward Graham, to and for the use of the said Ann Keating ; such action having been brought, and a special verdict taken therein by consent, and judgment also having been entered up without argument against the said William Marsh, Josias Henry Stracey, and George Edward Graham, the Defendants in the said action in the said Courts of King's Bench and Exchequer Chamber, for the purpose of the same being brought by writ of error before the House of Lords. This was directed to be done by a certain order made by the Lord Chancellor in the matter of the said William Marsh, Josias Henry Stracey, Henry Fauntleroy, and George Edward Graham, bankrupts, bearing date the 12th day of May, 1831, upon two several petitions presented to his Lordship by the assignees of the said bankrupts ; by one of which petitions the said assignees prayed (among other things), that the proof of debt made by the said Mrs. Ann Keating, under the commissions against the said bankrupts, might be expunged ; and by the other of the said petitions, they prayed to be permitted to file a bill in the High Court of Chancery, to expunge the said proof ; and that, in the mean time, certain other petitions, which they had presented to his Lordship for expunging other like debts, might be ordered to stand over until a final decision should have been given in the said



suit so to be instituted. Upon which two petitions his Lordship, on the 12th of May, 1831, made the following order : —

“ I do order, that for the purpose of trying the  
 “ question whether the said bankrupts were, at and  
 “ before the date and issuing forth of the said joint  
 “ and separate commissions, and still are, justly and  
 “ truly indebted to the said Ann Keating, in any  
 “ and what sum of money, an action be forthwith  
 “ brought, by or in the name of the said Ann Keat-  
 “ ing, against the said William Marsh, Josias Henry  
 “ Stracey, and George Edward Graham, in his Ma-  
 “ jesty’s Court of King’s Bench, for money had  
 “ and received by the said bankrupts, to and for  
 “ the use of the said Ann Keating, and that a spe-  
 “ cial verdict be taken in such action by consent  
 “ on a statement of facts, to be settled and certified  
 “ by me in case the parties differ about the same; and  
 “ that the Defendants in the said action do consent  
 “ to judgment being entered up in the said court,  
 “ and in the Court of Error, for the said Plaintiff,  
 “ for the purpose of the same being carried by  
 “ writ of error before the House of Lords, such  
 “ judgment therefore to be without prejudice to  
 “ the rights and case of the said Defendants. And  
 “ I do order, that the said action be carried by  
 “ writ of error before the House of Lords accord-  
 “ ingly. And I do further order, that the said  
 “ petitions herein set forth, and also the said four  
 “ other petitions in this matter therein referred to,  
 “ do stand over generally, with liberty to either of  
 “ the parties thereto respectively to make such  
 “ application thereon to this Court as they shall  
 “ be advised. And I do further order, that the

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“sum of 95,559*l.* 8*s.* 1*d.*, being the amount of  
“dividends declared upon this and former days in  
“respect of the said proof made by the said Ann  
“Keating, and also in respect of the several other  
“proofs made under the said commission, by  
“creditors in respect of the proceeds of stock sold  
“under powers of attorney, alleged to have been  
“forged, be invested by the assignees, under the  
“said joint commission, in the purchase of ex-  
“chequer bills in their names, and deposited with  
“Messrs. Coutts and Company, bankers, and that  
“the interest thereon be accumulated to abide  
“the further order of this Court, as to the dis-  
“position of the principal in respect whereof the  
“same shall have accrued, and then do follow such  
“principal.”

An action of assumpsit was accordingly brought by Mrs. Keating, and the declaration therein contained merely the common count for money had and received by the Defendants, to and for the use of the Plaintiff. To which declaration the Defendants pleaded the general issue. The cause was set down for trial at the London sittings after Hilary Term, 1832, and the following special verdict, which had been previously settled under the order of the Lord Chancellor, was then found by consent :—

“Afterwards, that is to say, on the day and year,  
“and at the place within mentioned, before the  
“Chief Justice within named, come as well the  
“within named Plaintiff as the within named De-  
“fendants, by their respective attorneys within  
“mentioned, and the jurors of the jury, whereof  
“mention is within made, being summoned, also

“come, who, to speak the truth of the matters  
 “within contained, being chosen, tried, and sworn,  
 “say upon their oath, that on the 10th day of  
 “October, in the year of our Lord 1819, there was  
 “standing in the books of the within named go-  
 “vernor and company of the Bank of England, in  
 “the name of the within named Plaintiff, the sum  
 “of 12,000*l.*, interest or share in the joint stock  
 “called reduced three per cent. annuities, trans-  
 “ferable at the said Bank of England ; and the  
 “jurors aforesaid, upon their oath aforesaid, further  
 “say, that the accounts of the proprietors of the  
 “said stock called reduced three per cent. annuities,  
 “are kept in certain books of the governor and  
 “company of the Bank of England called ledgers,  
 “and that accounts are entered in the form of  
 “debtor and creditor accounts in the said ledgers,  
 “of the whole amount of the said stock called  
 “reduced three per cent. annuities, in which ac-  
 “counts the sums either subscribed or transferred  
 “to individuals are stated as items to their credit  
 “on the one side of the account, and on the other  
 “side of the account they are debited with all sums  
 “transferred from their names ; and that certain  
 “other books are kept by the said governor and  
 “company of the Bank of England, in which are  
 “entered transfers of the said stock called reduced  
 “three per cent. annuities, from time to time, pur-  
 “porting to be signed by the parties transferring  
 “the same, or their attorney, lawfully authorized.  
 “That upon production of the transfer books, the  
 “clerks of the said governor and company of the  
 “Bank of England, who keep the ledgers, enter  
 “the sums transferred to the credit of the persons

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“to whom the transfers are made in the ledgers, by  
“adding those sums to their accounts, if they al-  
“ready have any, or by opening new accounts with  
“such persons, if they have not already any ac-  
“counts in such ledgers. That no entries in the  
“ledgers are made without the authority of the  
“entries which are made in the transfer books ;  
“but that, upon the production of such entries in  
“the transfer books, the entries are made in the  
“ledgers immediately, without further inquiry as to  
“the genuineness thereof. And that any person  
“on whose account any sum of stock appears in  
“such ledger, is permitted at any time, on applica-  
“tion at the Bank of England, to transfer the same,  
“or any part thereof, at his discretion. And the  
“jurors aforesaid, upon their oath aforesaid, fur-  
“ther say, that the accounts are balanced twice a  
“year, for the purpose of making out dividends,  
“and that the aggregate amount of the balances  
“form the aggregate of the said stock called re-  
“duced three per cent. annuities, and that such  
“aggregate amount is transmitted half yearly to  
“the audit office of the exchequer, for the purpose  
“of ascertaining the amount which will be wanted  
“for dividends, and that the dividends are calcu-  
“lated on the balance so ascertained. That an  
“account is also once a year transmitted to the  
“audit office of the exchequer, which contains the  
“names of all persons who appear, by the books  
“kept at the bank as aforesaid, to be the proprie-  
“tors of any part of the said annuities. That the  
“dividends are paid twice a year to the holders of  
“dividend warrants, which are made out from the  
“ledgers in the names of the persons who appear

“by the ledgers to be entitled thereto. And the  
 “jurors aforesaid, upon their oath aforesaid, fur-  
 “ther say, that the within named William Marsh  
 “received the dividends which became due in  
 “respect of the said sum of 12,000*l.*, in the said  
 “stock called reduced three per cent. annuities, in  
 “the month of October, 1819, under and by virtue  
 “of a power of attorney, dated the 7th June, 1803,  
 “from the within named Plaintiff to the said Wil-  
 “liam Marsh, Sir James Sibbald, baronet, Josias  
 “Henry Stracey, and William Fauntleroy, being  
 “the persons at the date thereof composing the  
 “firm of Marsh, Sibbald, and Company, and paid  
 “them to the house of Marsh and Company,  
 “bankers, in Berners Street, to the account of the  
 “Plaintiff, who had a banking account with the  
 “said house. And the jurors aforesaid, upon their  
 “oath aforesaid, further say, that on the 29th day  
 “of December, in the year of our Lord 1819, an  
 “entry was made in one of the transfer books of  
 “the said governor and company of the Bank of  
 “England, purporting to be a transfer under a  
 “power of attorney, purporting to be granted by  
 “the said Plaintiff to the said William Marsh,  
 “Josias Henry Stracey, George Edward Graham,  
 “and Henry Fauntleroy, the persons who, at the  
 “date thereof, composed the firm of Marsh and  
 “Company, jointly, and each of them severally,  
 “of an interest or share in the said stock called  
 “reduced three per cent. annuities, which entry is  
 “as follows :—

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“ ‘ No. Reduced 3*l*. per cent. an-

“ ‘ nities.

“ ‘ I, Ann Keating, of Chingford

“ ‘ Hatch, widow, this 29th day of

“ ‘ December, in the year of our

“ ‘ Lord 1819, do assign and transfer

“ ‘ 9000*l*. of my interest or share in

“ ‘ the capital or joint stock of re-

“ ‘ duced three pounds per cent. an-

“ ‘ nities, consolidated by acts of

“ ‘ parliament of the 25 and 26 Geo.

“ ‘ II., and 5 and 21 Geo. III., and

“ ‘ by other subsequent acts, charged

“ ‘ on the sinking fund, transferable

“ ‘ at the Bank of England, together

“ ‘ with the proportionate annuity

“ ‘ attending the same, unto William

“ ‘ Brackstone Tarbutt, of the Stock

“ ‘ Exchange, gentleman, his execu-

“ ‘ tors, administrators, or assigns.

“ ‘ Witness my hand,

“ ‘ *W. Marsh* and *H. Faunt-*

“ ‘ *leroy*, attornies.

(Signed) “ ‘ *H. Fauntleroy*, at-

“ ‘ torney to A. Keating.

“ ‘ Witness, *M. Harley*.

£ s. d.  
9000 0 0

“ ‘ I do freely and voluntarily accept the above

“ ‘ interest or share transferred to

“ ‘ Witness, . . .

“ ‘ And the jurors aforesaid, upon their oath

“ ‘ aforesaid, further say, that the power of attorney

“ ‘ under which the said entry was made, was not

“ ‘ executed by the within-named Plaintiff, but that

“ ‘ the signature to the said power of attorney, pur-

“ ‘ porting to be the signature of the said Plaintiff,

“ was forged by the said Henry Fauntleroy, and  
“ that the said Henry Fauntleroy had not any au-  
“ thority from the said Plaintiff to make any such  
“ transfer ; and that the said Plaintiff did not ever  
“ authorize or request the within-named governor  
“ and company to make any transfer of the said  
“ sum of 9000*l.* in the said stock, or any part  
“ thereof. And the jurors aforesaid, upon their  
“ oath aforesaid, further say, that in consequence  
“ of such entry in the transfer book, an entry was  
“ made in one of the ledgers of the within-named  
“ governor and company of the Bank of England,  
“ by which the within-named Plaintiff was debited  
“ with the said sum of 9000*l.*, reduced three per  
“ cent. annuities, and credit was given to the said  
“ William Brackstone Tarbutt, for the sum of 9000*l.*  
“ in the said stock, and that from that time the  
“ said Plaintiff ceased to have credit for the said  
“ sum of reduced three per cent. annuities in the  
“ said ledger ; and that on or about the 11th day  
“ of January, 1820, the said Marsh and Company  
“ purchased for the said Plaintiff the sum of 3000*l.*  
“ reduced three per cent. annuities, and caused  
“ the same to be transferred to the said Plaintiff,  
“ whereby there appeared the sum of 6000*l.* to the  
“ credit of the said Plaintiff in the said ledgers  
“ kept at the Bank of England, and no more.  
“ And the jurors aforesaid, upon their oath afore-  
“ said, further say, that the said William Marsh  
“ attended at the Bank of England in the month of  
“ April, 1820, and duly received the dividend which  
“ became due on the said sum of 6000*l.* three per  
“ cent. reduced annuities, on the 5th day of April,  
“ 1820, and signed a receipt for the same, as the  
“ attorney of the said Plaintiff. And the jurors

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“aforesaid, upon their oath aforesaid, further say,  
“that since the 29th day of December, 1819, very  
“numerous transfers of reduced three per cent.  
“annuities, of sums both great and small, have  
“been made to and by the said William Brack-  
“stone Tarbutt, which have been debited and  
“credited to him ; and that in the books kept by  
“the said governor and company, the said sum of  
“9000*l.* reduced three per cent. annuities has be-  
“come blended and mixed with other stocks stand-  
“ing in the said ledgers, in the said William Brack-  
“stone Tarbutt’s name, and in the said books ap-  
“pears to have been transferred and assigned by  
“him, and it is not possible to distinguish the ac-  
“count to the credit of which the said 9000*l.* re-  
“duced three per cent. annuities stand, which were  
“so carried to the credit of the said William  
“Brackstone Tarbutt, and debited to the within-  
“named Plaintiff as aforesaid ; and that no divi-  
“dend warrant has at any time since the said 9th  
“day of December, 1819, been made out for or in  
“respect of the dividends on the said 9000*l.* re-  
“duced three per cent. annuities in favour of the  
“said Plaintiff, either together with or apart from  
“any other sum of stock, but that the dividend  
“thereon has been ever since paid to other persons  
“appearing on the said books to be the transferrees  
“thereof. And the jurors aforesaid, upon their  
“oath aforesaid, further say, that the within-named  
“Plaintiff did not consent to, and had not any  
“knowledge of the above entries or entry having  
“been made in the books of the within-named  
“governor and company. And the jurors afore-  
“said, upon their oath aforesaid, further say, that  
“upon the 10th day of September, 1824, the said



“ Henry Fauntleroy was apprehended, on a charge  
 “ of forging letters of attorney for the transfer of  
 “ certain other annuities in the Bank of England ;  
 “ and that the governor and company of the Bank  
 “ of England undertook to prosecute the said  
 “ Henry Fauntleroy. And the jurors aforesaid,  
 “ upon their oath aforesaid, further say, that the  
 “ said Plaintiff informed the said governor and  
 “ company of the Bank of England of the forgery  
 “ so committed, as soon as the same came to her  
 “ knowledge. And that the said governor and  
 “ company caused several indictments to be pre-  
 “ pared against the said Henry Fauntleroy, for  
 “ forging letters of attorney for transfer of parts of  
 “ the annuities transferable at the Bank of Eng-  
 “ land, and that the said Henry Fauntleroy was  
 “ tried and convicted upon one of such indict-  
 “ ments, upon the 30th day of October, 1824, and  
 “ executed on the 30th day of November in the  
 “ same year, but that neither the said Plaintiff, nor  
 “ the said governor and company, preferred any in-  
 “ dictment against the said Henry Fauntleroy, in  
 “ respect of forgery of the power of attorney here-  
 “ in-before referred to. And the jurors aforesaid,  
 “ upon their oath aforesaid, further say, that Marsh  
 “ and Company kept an account with Martin,  
 “ Stone, and Company, bankers, in the city of  
 “ London, in the usual way of a banker’s account.  
 “ And that a pass-book went from one house to  
 “ the other from time to time, according to the  
 “ usual practice between bankers. And the jurors  
 “ aforesaid, upon their oath aforesaid, further say,  
 “ that Marsh and Company kept a book called a  
 “ house-book, in which corresponding entries to  
 “ those in the pass-book ought to have been made,  
 “ and that in the due course of business the pass-book

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“ and the house-book of Marsh and Company ought  
 “ to have corresponded. And the jurors aforesaid,  
 “ upon their oath aforesaid, further say, that the  
 “ house-book was in constant use in the banking-  
 “ house of Marsh and Company, and that the  
 “ pass-book was frequently brought thither from  
 “ the house of Martin and Company, and that  
 “ when it was at the banking-house of Marsh and  
 “ Company, the said Henry Fauntleroy kept the  
 “ same generally locked up in his own desk. And  
 “ the jurors aforesaid, upon their oath aforesaid,  
 “ further say, that the said Henry Fauntleroy was  
 “ permitted by the other bankers to conduct the  
 “ greater part of the business of the said banking-  
 “ house, without their interference, that they re-  
 “ posed great confidence in the said Henry Faunt-  
 “ leroy, and that the said Henry Fauntleroy made  
 “ very many false entries and omissions in the house-  
 “ book, so that the same did not correspond with  
 “ the pass-book in many instances. That the said  
 “ Henry Fauntleroy paid into the hands of Martin  
 “ and Company, and drew out of their hands con-  
 “ siderable sums, for his own individual use, which  
 “ appeared respectively in the pass-book, but not  
 “ in the house-book, and also made very many false  
 “ entries in the other books of the firm, without  
 “ the knowledge, and in fraud of his partners, to  
 “ a large amount. And the jurors aforesaid,  
 “ upon their oath aforesaid, further say, that on  
 “ the 29th day of December, in the year of  
 “ our Lord 1819, the said Henry Fauntleroy  
 “ ordered one Thomas Butterfield Simpson, a  
 “ stock-broker, to sell out the sum of 9000*l*.  
 “ reduced three per cent. annuities, described as  
 “ standing in the books of the said governor and  
 “ company of the Bank of England, in the name

“ of the said Plaintiff, and that the said Thomas  
 “ Butterfield Simpson sold the same to the said  
 “ William Brackstone Tarbutt, for the sum of  
 “ 6018*l.* 15*s.*, which sum he received from the said  
 “ William Brackstone Tarbutt. That according to  
 “ the course of business between the said Thomas  
 “ Butterfield Simpson and the said Marsh, Stracey,  
 “ and Company, the said Thomas Butterfield Simp-  
 “ son allowed the said Marsh, Stracey, and Company,  
 “ one half of the usual commission when employed  
 “ by them to effect sales, and upon the said sale he  
 “ allowed one half of the commission; and that the  
 “ said Thomas Butterfield Simpson paid the sum  
 “ of 6013*l.* 2*s.* 6*d.*, being the amount of the sum so  
 “ received by him from the said William Brack-  
 “ stone Tarbutt, deducting one half of the usual  
 “ commission, by a check payable to the said Marsh  
 “ and Company, into the hands of Messrs. Martin  
 “ and Company, to the account of Marsh and Com-  
 “ pany; and the same was entered by them in  
 “ their pass-book, as ‘Cash per Fauntleroy,’ the  
 “ name of Fauntleroy denoting the name of the  
 “ individual by or on whose behalf the payment  
 “ was made. And the jurors aforesaid further say,  
 “ that no entry was made, at any time, of the said  
 “ sum of 6013*l.* 2*s.* 6*d.*, in the house-book, or any  
 “ other books of Marsh and Company, but only in  
 “ the pass-book of that firm with Martin and Com-  
 “ pany; that it was the business of the said Henry  
 “ Fauntleroy, as between himself and his co-  
 “ partners, to have entered the said sum in the  
 “ house-book, if it had been intended by him for  
 “ the account of Marsh and Company; that among  
 “ the books kept by the said Marsh and Company,  
 “ there was, besides the said house-book, a daily  
 “ balancing-book, purporting to contain a daily re-

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“ cord of the amount of cash left in the drawers in  
 “ Berners Street, and the amount of cash at Martin  
 “ and Company’s, as shown by the said house-book,  
 “ after the conclusion of each day’s transactions,  
 “ accompanied by a proof of the correctness of  
 “ such balance. That the said Henry Fauntleroy in  
 “ general made up such daily balances in the said  
 “ balancing-book, and the said sum of 6018*l.* 2*s.* 6*d.*  
 “ was not entered in the house-book, nor in the  
 “ daily balancing-book, on the said 29th day of De-  
 “ cember, 1819, or at any other time, nor did the  
 “ same ever come into the yearly balances of the  
 “ said house of Marsh and Company, or in any  
 “ other manner into their books. And the jurors  
 “ aforesaid further say, that no individual partner  
 “ of the house of Marsh and Company could draw  
 “ monies out of the said account of Martin, Stone,  
 “ and Company, but by drafts signed in the part-  
 “ nership name or firm; but that the said Henry  
 “ Fauntleroy paid in, and, by means of such drafts,  
 “ drew out, large sums of money for his own  
 “ individual purposes; and that the account be-  
 “ tween the said Marsh and Company, and Martin  
 “ and Company was repeatedly balanced between  
 “ the said 29th of December, 1819, and the bank-  
 “ ruptcy of Marsh and Company. And the jurors  
 “ aforesaid, upon their oath aforesaid, further say,  
 “ that on the 13th day of September, in the year of  
 “ our Lord 1824, in consequence of the discovery  
 “ of the forgeries of the said Henry Fauntleroy,  
 “ they, the said William Marsh, Josias Henry  
 “ Stracey, and George Edward Graham, became  
 “ bankrupts; and a commission of bankruptcy,  
 “ bearing date the 16th day of the same month, was  
 “ duly awarded and issued against them, under  
 “ which they were duly found and declared bank-

“rupts; and on the 26th day of October following,  
 “the said Henry Fauntleroy also became bank-  
 “rupt, and a commission of bankruptcy, bearing  
 “date the 29th day of the same month, was duly  
 “awarded and issued against the said Henry  
 “Fauntleroy, under which he was on the same day  
 “duly found and declared bankrupt. And the  
 “jurors aforesaid, upon their oath aforesaid, further  
 “say, that in the month of April, 1820, credit was  
 “given to the said Plaintiff by the said house of  
 “Marsh and Company in the banking account  
 “kept by the said Plaintiff with the said house,  
 “for the dividend on the sum of 15,000*l.* reduced  
 “three per cent. annuities, 9000*l.* stock, parcel  
 “thereof, being the 9000*l.* reduced annuities be-  
 “fore mentioned, the entries respecting the said  
 “dividends being made by the said Henry Faunt-  
 “leroy, or under his immediate direction; and that  
 “from the month of April, in the year of our Lord  
 “1820, up to the date of the said bankruptcy,  
 “entries were made in the books of Marsh and  
 “Company by which the Plaintiff’s account was  
 “credited with a sum of money as the dividends  
 “on the reduced three per cent. annuities then in  
 “her name, including in such account the divi-  
 “dends on the said 9000*l.* reduced three per cent.  
 “annuities, as if those dividends had been regularly  
 “received from time to time, such entries respect-  
 “ing the said dividends having likewise been made  
 “by the said Henry Fauntleroy, or under his im-  
 “mediate directions; and that, until after the ap-  
 “prehension of the said Henry Fauntleroy before  
 “mentioned, the said William Marsh, Josias Henry  
 “Stracey, and George Edward Graham, and each  
 “them, were wholly ignorant of the said forgery  
 “herein-before mentioned. And the jurors afore-

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“ said, upon their oath aforesaid, further say, that  
 “ after the bankruptcy the within named Plaintiff  
 “ made application to the said governor and com-  
 “ of the Bank of England, respecting the said sum  
 “ of 9000*l.* interest, or share in the said stock called  
 “ reduced three per cent. annuities, and that there-  
 “ upon the following letter was written by the at-  
 “ tornies of the said governor and company of the  
 “ Bank of England to the within named Plaintiff:—

“ ‘ *New Bank Buildings, 4th Dec. 1824.*

“ ‘ MADAM,

“ ‘ The Governor and Directors of the Bank of  
 “ ‘ England have had under their consideration  
 “ ‘ your claim to have 9000*l.* reduced three per  
 “ ‘ cent. annuities, which formerly stood in your  
 “ ‘ name replaced. They find, upon inquiry, that  
 “ ‘ the stock in question was sold and transferred  
 “ ‘ in your name by one of the partners of the late  
 “ ‘ firm of Marsh, Stracey, and Company, and that  
 “ ‘ the produce of the stock was paid into the  
 “ ‘ funds of Messrs. Marsh, Stracey, and Company;  
 “ ‘ you have, therefore, as the Bank is advised, a  
 “ ‘ right to prove the amount received on your ac-  
 “ ‘ count, and to receive a dividend upon that proof  
 “ ‘ under Messrs. Marsh, Stracey, and Company’s  
 “ ‘ commission, and we are directed by the Go-  
 “ ‘ vernor and Directors to request that such proof  
 “ ‘ may be tendered and enforced by petition, if it  
 “ ‘ should not be admitted by the Commissioners;  
 “ ‘ after which the Bank will be ready to replace  
 “ ‘ the amount of your stock so sold, upon having  
 “ ‘ an assignment of your proof; and the dividends  
 “ ‘ on the stock so replaced, which accrued sub-  
 “ ‘ sequent to the latest period at which they were

“ ‘ credited to you by Messrs. Marsh, Stracey, and  
“ ‘ Company, will also be paid to you.

“ ‘ We beg to add, that we are ready to afford  
“ ‘ you information and assistance as to the evi-  
“ ‘ dence by which your right to prove will be  
“ ‘ established.

“ ‘ We are, Madam,

“ ‘ Your most obedient Servants,

“ ‘ FRESHFIELD and KAYE.’ ”

“ ‘ Mrs. Keating.’ ”

And the jurors aforesaid, upon their oath afore-  
said, further say, that on the 1st of August, in the  
year 1825, the said Governor and Company of the  
Bank of England paid the within named Plaintiff  
the sum of 270*l.*, on her signing and entering into  
the following receipt and agreement.

“ ‘ August 1, 1825.—Received of the Governor  
“ ‘ and Company of the Bank of England, the sum  
“ ‘ of 270*l.* being the amount which would have  
“ ‘ been payable to me by way of dividend on  
“ ‘ 9000*l.* reduced three per cent. annuities hereto-  
“ ‘ fore standing in my name for the two half years  
“ ‘ ending the 10th day of October and the 5th day  
“ ‘ of April last, if that stock had not been trans-  
“ ‘ ferred, as I allege it to have been, without any  
“ ‘ legal authority from me.

“ ‘ I say, received the same, without prejudice  
“ ‘ to any right I may have to prove for the pro-  
“ ‘ duce of the said stock under Marsh and Com-  
“ ‘ pany’s commission, or my right to claim to have  
“ ‘ the said stock replaced by the said Governor  
“ ‘ and Company. And I do hereby engage (in  
“ ‘ case the said debts should be decided by a

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“ ‘ court of law to be proveable against the said  
 “ ‘ bankrupts’ estate), when required by the said  
 “ ‘ Governor and Company, and at their expense,  
 “ ‘ to tender, or cause to be tendered, a proof to  
 “ ‘ the Commissioners under the bankruptcy of  
 “ ‘ Marsh and Company, in respect of the produce  
 “ ‘ of such stock so sold out by them; and in case  
 “ ‘ such proof shall be rejected, to permit my  
 “ ‘ name to be used in a petition to be presented  
 “ ‘ by and at the expense of the said Governor and  
 “ ‘ Company to the Court of Chancery, for the  
 “ ‘ purpose of enforcing their acceptance of such  
 “ ‘ proof as a debt against the said bankrupts’  
 “ ‘ estate, on being indemnified by the said Go-  
 “ ‘ vernor and Company, from all costs, charges,  
 “ ‘ and expenses which I may sustain or be put to  
 “ ‘ in respect thereof, without prejudice to my right  
 “ ‘ to claim, notwithstanding such proof, to have  
 “ ‘ the said stock replaced in my name by them.

(Signed) “ ‘ ANN KEATING.’ ”

“ ‘ Witness. D. DAVIES, Clerk to D. CLIFTON.’ ”

“ ‘ And the jurors aforesaid, upon their oath  
 “ ‘ aforesaid, further say, that the said Plaintiff  
 “ ‘ being examined before the Commissioners of  
 “ ‘ Bankrupt under the commission awarded and  
 “ ‘ issued against the said Marsh and Company,  
 “ ‘ entered into and signed, by her agent thereunto  
 “ ‘ lawfully authorized, the admission following,  
 “ ‘ that is to say:

“ ‘ In the Matter of *Marsh and Company*, ex-  
 “ ‘ parte Ann Keating.

“ ‘ The said Ann Keating hereby admits that the



“ ‘ paper writing, bearing date the 22d of Decem-  
 “ ‘ ber, 1819, and purporting to be a power of at-  
 “ ‘ torney from her to William Marsh, Josias Henry  
 “ ‘ Stracey, Henry Fauntleroy, and George Edward  
 “ ‘ Graham, referred to in the examination of James  
 “ ‘ Fenn before the Commissioners, on 18th Sep-  
 “ ‘ tember last, and 4th June instant, and exhibited  
 “ ‘ to the Commissioners, was not executed by her,  
 “ ‘ or by her authority, but is forged and fraudu-  
 “ ‘ lent. That she discovered such forgery at or  
 “ ‘ about the time of the apprehension of Henry  
 “ ‘ Fauntleroy, in September, 1824, and gave in-  
 “ ‘ formation thereof to the Governor and Company  
 “ ‘ of the Bank of England, but did not institute  
 “ ‘ any criminal proceedings against any person in  
 “ ‘ respect of such forgery; and further, that she  
 “ ‘ the said Ann Keating has demanded from the  
 “ ‘ said Governor and Company the full amount of  
 “ ‘ stock in respect of which the present claim is  
 “ ‘ made, and all dividends thereon, and that she  
 “ ‘ intends to insist upon such demand, and to en-  
 “ ‘ force the same by law, if necessary, and that  
 “ ‘ 135*l.* is the amount of the half-yearly payment  
 “ ‘ of the said annuity, and that she has received  
 “ ‘ the said sum of 135*l.* half-yearly from the Bank  
 “ ‘ of England, from the time of Marsh and Com-  
 “ ‘ pany’s bankruptcy, down to the present time,  
 “ ‘ upon signing a receipt and undertaking, whereof  
 “ ‘ the following is a copy :—

(Here the receipt and undertaking was inserted,  
 as *antè*, p. 667, 668.).

“ ‘ And the said Ann Keating further admits,  
 “ ‘ that this claim is prosecuted by, and for the  
 “ ‘ benefit, and at the expense of the Bank of Eng-  
 “ ‘ land, and that whether the same shall fail or be

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“ ‘ established, she insists upon her demand against  
 “ ‘ the Bank of England as above stated.

“ ‘ *Freshfield and Son*, Solicitors for Mrs.  
 “ ‘ Keating, in the matter of this claim.

“ ‘ But whether or not, upon the whole matter  
 “ ‘ aforesaid, by the jurors aforesaid, in form afore-  
 “ ‘ said found, the said Defendants did undertake  
 “ ‘ and promise, the jurors aforesaid are altogether  
 “ ‘ ignorant, and thereupon they pray the advice of  
 “ ‘ the court of the said Lord the King, before the  
 “ ‘ King himself. And if upon the whole matter  
 “ ‘ aforesaid it shall seem to the said court, that the  
 “ ‘ said Defendants did undertake and promise,  
 “ ‘ then the jurors aforesaid, upon their oath afore-  
 “ ‘ said say that the said Defendants did undertake  
 “ ‘ and promise in manner and form as the said  
 “ ‘ Plaintiff hath within thereof complained against  
 “ ‘ them, and in that case they assess the damages  
 “ ‘ of the said Plaintiff, by reason thereof, over and  
 “ ‘ above her costs and charges by her, about her  
 “ ‘ suit in this behalf expended, to 6013*l.* 2*s.* 6*d.*,  
 “ ‘ and for those costs and charges to 40*s.*: But if  
 “ ‘ upon the whole matter aforesaid, it shall seem  
 “ ‘ to the said court that the said Defendants did  
 “ ‘ not undertake and promise, then the jurors  
 “ ‘ aforesaid, upon their oath aforesaid say, that  
 “ ‘ the said Defendants did not undertake or pro-  
 “ ‘ mise in manner and form as the said Plaintiff  
 “ ‘ hath within thereof complained against them.’ ”

In Easter Term, 1832, judgment was entered up in the Court of King’s Bench, without argument, for the Plaintiff, and a writ of error being thereupon brought into the Court of Exchequer Cham-

ber, the judgment of the King's Bench was also, without argument, affirmed in that court, the object of the parties being to bring the matter in issue before the House of Lords without delay; and thereupon the Defendants below accordingly brought their writ of error in Parliament, and assigned general errors. The Plaintiff below joined in the error.

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For the Plaintiffs in error, Sir *Edward Sugden* and Mr. *Kelly*.

Mrs. Keating, the Defendant in error, is still the proprietor of the 9000*l.* stock, she could not be deprived of her property in the stock by the wrongful acts of other persons, without her knowledge or consent. The statutes which create and define the nature of the stock also prescribe the only mode in which it can be legally transferred, and that mode has not in the present case been adopted; Mrs. Keating's rights are therefore untouched, and her property in the stock is not divested. The act which is supposed to have deprived Mrs. Keating of her property, and conveyed it to another, is merely an unauthorized entry in the bank books, made without the knowledge or consent of the stock proprietor, and without the signature of herself or her attorney, as required by the statutes. If by such means the property in stock could be divested, any one, or the entire body of the public creditors, might in a day be despoiled of their whole properties and fortunes by the fraud, or the negligence of a few clerks in the Bank. The argument that the parties injured have a remedy against those who have profited by the fraud, or against the Bank of England, assumes that the property is

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divested, which is the question at issue. The party cannot be the creditor of the government, and yet have a right of action against the Bank; and the public creditor, who has duly and in the manner prescribed by the statutes invested his money in public securities, has a right to look to the state for the safety of his property, and his claim upon the state, which he has purchased for good consideration, and upon the faith of many acts of parliament, cannot be destroyed, or in anywise altered or affected, without his own consent. Here no consent, prior or subsequent, express or implied, has been given. The question of transfer rests upon the mere entry in the Bank books, and the entry, although it is the record or registration of a transfer, and may be *prima facie* evidence of a transfer, cannot of itself effect the transfer and work a change of property, unless coupled with the authority and signature required by the act of parliament. By the constitution of the public debt, under the acts of parliament by which it is created, the government are the debtors and obligors in the payment of the annuities stipulated, to the parties entitled by original subscription, or legal transfer. No act of the government, or its agents, in the management of the accounts, can alter the legal rights of the parties entitled. No fraud or mistake of the government, or its agents, could change the estate and interest of a stockholder, from a right to a parliamentary annuity, into a right of action for damages against the government, or the bank, or any other party whatsoever.

The simple question is: Has the individual stockholder transferred his stock? The duty of the government, or its agents, is merely to conduct as

instruments, a transaction founded upon a legal and valid contract, between the stockholder and any purchaser to whom he shall assign and transfer his right, but it is undeniable that Mrs. Keating, according to the truth of the case found and shewn by the special verdict, neither sold nor transferred, nor affirmed any act professing to be a sale and transfer of her stock, in consequence of which the pretended transfer in the books of the Bank appears to have been made. No proposition can be more clear and certain, than that a creditor, whether of the government or of an individual, cannot be deprived of his right to the debt, except by some act to which he is, by himself or his agent, a party, or by the express provision of an act of parliament. If this be so, Mrs. Keating is still the proprietor of the stock, her claim is against the state, and her position is unaltered. *Hildyard v. S. Sea Company*\*, *Monk v. Graham*†, *Harrison v. Pryse*‡, *Ashley v. Blackwell*§, *Davis v. Bank of England*||, *Hume v. Bolland*¶, *Stracey v. Bank of England*\*\*\*, *Hume v. Bolland*††, *Ex parte Bolland Re Marsh.*‡‡

If it should be contended that Mrs. Keating might elect to affirm the act of transfer, by subsequent recognition, although it was originally done without her authority, yet no such affirmance has taken place. On the contrary, the special verdict finds that the act was done without her knowledge or consent, and that she never did assent to it. To entitle the Defendant in error to rely on a subse-

\* 2 P. W. 76. † 8 Mod. 9. ‡ Barnard. 324.

§ 2 Eden, 299. || 2 Bing. 393. and 5 B. & C. 185.

¶ 1 Ry. & Moody, 371. \*\* 6 Bing. 754.

†† 2 Tyrr. 575.

‡‡ 1 Montag. & McArth. 315. *Doe v. Butcher.* Doug. 50.

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quent recognition, that fact should have been found. Not being found, it cannot be inferred, and even if there were any grounds for such an inference (which is denied), no affirmance can be implied before the bankruptcy of Marsh and Company, to the time of which this action (being with a view to proof under the commission) relates. Besides Mrs. Keating cannot at once affirm and disaffirm the same act, and it appears by the special verdict, that she has insisted on her remedy against the Bank, and has actually received the amount of some of the dividends. The doctrine of *ratihabitio* does not apply to the present case, for although a person may affirm an act done in his name, but without his authority, as against the party doing the act, it is because such party is estopped from saying that he has not the authority which he pretended to have; but he has no such right against third persons, and therefore, even if Mrs. Keating could have affirmed the transfer, as against Fauntleroy, and treated the produce as money had and received to her use in his hands, she has no such election against Marsh and Company, between whom and herself there was no privity, and who are not estopped (even if Fauntleroy was,) from saying that the transfer was without authority, and therefore void. If under any circumstances Mrs. Keating might make such election as against Messrs. Marsh and Company, she was bound to elect promptly, and give notice to Marsh and Company, in order that they might retain any money they might have received, or adopt any other remedy they might possess against Fauntleroy, but no such election or notice is found by the verdict. Acts which are void in their commencement can-



not be made valid by subsequent ratification. Co. Lit. 215 a. 295 b. *Jones v. Verney*\*, *Doe v. Butcher*†, *Jenkins v. Church*‡, *Doe v. Watts*§, Com. Dig. Tit. Infant. C. 7.; 18 Vin. Abr. Tit. *Ratihibitio*.

The felonious act of Fauntleroy could not be made valid by affirmance, especially against parties innocent, and not cognizant of the felony, and where the felon has not been prosecuted for such felony, nor was it competent for the Plaintiff below to maintain any action, either against Henry Fauntleroy, or any person deriving through him, for restitution of the property divested by the felony, or any compensation or damages in respect of the felonious act, without having prosecuted the felon. *Taylor v. Plumer*||, *Ex parte Bolland Re Marsh*¶, *Clarke v. Johnson*\*\*\*, *Pinto v. Santos*††. This action being for money had and received, cannot be maintained against Marsh and Company; they never did, in fact, receive the money; there was no constructive receipt of it by any entry in their books, or acknowledgment to the party claiming it. It was paid into Martin and Company's by Fauntleroy, and drawn out without their knowledge, the money itself cannot be identified, and there is no privity between the Plaintiff and the Defendants. Even supposing the money had actually come to their hands, and been afterwards drawn out by Fauntleroy, they would not have been liable any more than a banker, into whose hands money obtained by felony or fraud had been paid in, and afterwards

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\* Willes. 177. † Doug. 50. ‡ Cowp. 482.

§ 7 T. R. 83. || 3 Maule & Sel. 562. 579.

¶ 1 Mont. & Mc. 315. \*\*\* Lofft. 756.

†† 1 Marsh. 132.; 5 Tau. 447.

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drawn out by a customer in the usual course of business, would be liable to the party defrauded. In the transaction by which Fauntleroy became possessed of the money paid into Martin and Company's, he did not act as partner of the firm of Marsh and Company, nor for their benefit—it was a step in the conduct of the fraud and felony adopted for his own convenience. The money was not obtained on the authority of the partnership, nor in fact applied to its purposes. It was money which neither actually nor constructively was received to the use of Mrs. Keating. It is a mere fiction to treat this money as the money of Mrs. Keating. It is an additional fiction to imply a legal contract, from circumstances inconsistent with the facts of the case. The money was obtained by a felonious act, and can the innocent partners, by implication of law, be made parties to the wrongful act? The real facts of the case, as found by the special verdict, negative any tortious or beneficial receipt of this money by the firm of Marsh and Company, from which a legal liability to Mrs. Keating can be implied. *Horwood v. Smith*\*, *Dawkes v. Coveney*†, *Brewer v. Sparrow*‡, *Wilson v. Poulter*. § Partners cannot be liable in contract, unless they are fixed with a knowledge of the transaction, and money improperly obtained and mixed with other monies cannot be recovered against innocent parties,—as if money should be acquired by robbery on the highway and carried to the account of a firm. *Ex parte Apsey Re Allen* ||, *Ex parte Heaton Re Moxon* ¶, *Ex parte Watson*. \*\*

\* 2 T. R. 750.

† Styles, 346.

‡ 7 B. &amp; C. 310.

§ Strange, 859.

|| 3 Bro. C. C. 265.

¶ Buck. 386.

\*\* 2 V. &amp; B. 414.

This is an equitable action, and the Bank of England, being the real claimants, they cannot enforce against Marsh and Company a claim which arises only by means of their own negligence; no negligence is found in Marsh and Company, and even if there were negligence on both sides, the parties are *in pari delicto* and the rule, *potior est conditio possidentis*, applies.

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For the Defendants in error, Serjeant *Taddy* and Sir *James Scarlett*.

It is found in substance by the verdict that the proceeds of the stock went into the funds of Marsh and Company. The entry, "cash per Fauntleroy," and the concealment by him of the pass-book are immaterial. The money was received by the agent of the house, paid to their account, and they had credit for it. The verdict finds that they were not cognizant of the claim. But in October, 1819, Marsh himself received dividends on 12,000*l.* stock. In April, 1820, he received dividends on 6000*l.*, both times as the attorney of Mrs. Keating; and in April, 1820, credit is given to Mrs. Keating, by Marsh and Company, for dividends on 15,000*l.* stock. They receive half the commission on the sale of the stock, and the accounts with Martin and Company are frequently balanced. Upon these facts, can it be maintained, that with ordinary diligence and discretion they could remain ignorant of the true state of the fact.

It is argued that they were not her agents for selling the stock, and that to treat them so would compromise a felony, which is against the policy of the law. But here the felon has been convicted and executed, so that there is no danger of compro-

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mise, and a civil action may be maintained ; *Crosby v. Leng* \*, *Dawkes v. Coveney* †. This question was considered and disposed of in *Ex parte Bolland* ‡, and *Stone v. Marsh*. §

As to the form of action, the damages for the tort may be waived, and the party may sue for the proceeds without affirming the wrongful act ; *Hunter v. Prinsep* ||, *Young v. Marshal* ¶. A Plaintiff has always had the election to sue in Tort or Contract, Bro. Abr., Action Co. Litt. 153. b. n. 7., s. 558, 559. The same principle is applied as to the effects of disseisin and dispossession. *Atkins v. Horde*. \*\*

The argument that the Plaintiff is estopped by her agreement with the Bank is untenable, as they are no parties to the agreement. *Brewer v. Gregory* is not an authority for such a doctrine. It is said that the stock remains untransferred, because the forms prescribed by statute †† have not been pursued. The argument stands upon the case of *Drvis v. the Bank of England*. But the authority of that case is questionable. The Court of King's Bench held that the Bank were not liable for the dividends. The principle of that decision must apply to the stock itself.

It is unnecessary to decide whether the Bank of England is responsible. If Marsh and Company received the proceeds, the Plaintiff having different remedies against different parties, may elect which to pursue. The claim is not, as it is argued, made through, but notwithstanding the fraud or felony, as in *Taylor v. Phumer*. How can the Defendants

\* 12 East, 409. † Styles, 346. ‡ Mont. & Mc. 315.

§ 6 B. & C. 551. || 10 East, 375. ¶ 8 Bing. 43.

\*\* 1 Burr. 60.

†† 21 Geo. 3. c. 14. § 18.; and see 24 Geo. 3. c. 39. § 14.

be intitled to hold the proceeds of the Plaintiff's property by the fraud and felony of their partner.

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At the conclusion of the argument, the *Lord Chancellor* proposed questions for the consideration of the judges, observing that although it was not expressly found by the special verdict that Marsh and Company were cognizant of the payment to Martin and Company, yet that it was clear from the facts found that they had the means of knowledge, and, if they were ignorant, it was the consequence of their own negligence.

On the 9th of June the unanimous opinion of the judges was delivered in the House, by Mr. Justice *Park*, as follows :—

The question which your Lordships have been pleased to propose for the opinion of his Majesty's judges, amounts in substance to this, whether the produce of stock, formerly standing in the name of Mrs. Ann Keating, the Plaintiff below, but transferred out of her name on the 29th December, 1819, without her authority, and under a power of attorney, which had been forged by one of the partners of the Defendants below, the bankers of Mrs. Keating, which partner has been since convicted and executed for another forgery, can, under the circumstances stated in the special verdict, be considered as money had and received by the surviving partners, to the use of the Plaintiff below, and be recovered by her in that form of action. And after hearing the argument at your Lordships' bar, and consideration of the facts stated in the special verdict, all the judges who were present at the argument, including the Lord Chief

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Justice of the Common Pleas, who is absent at *Nisi Prius*, and Mr. Baron Bayley, who has resigned his office since the argument, agree in opinion that such question is to be answered in the affirmative.

The first objection raised against the Plaintiff's right to recover, and upon which great reliance has been placed at your Lordships' bar, is an objection which, if allowed to prevail, would be equally strong against the Plaintiff's right to recover damages in any form of action and against any person. It is objected that the Plaintiff below has not sustained any damage by the alleged transfer of the stock, for that the power of transferring stock is a power given by statute, and the exercise of such power is expressly restrained by the statute to one mode only, viz. : "by entries in the transfer books "kept at the bank," which entry, it is enacted, "shall be signed by the parties making such transfer, or their attornies, authorized by writing "under their hand and seal, and that no other "method of transferring stock shall be good." Inasmuch, therefore, as the supposed transfer of the stock in question has not been exercised by that mode, the entry in the transfer book kept at the bank not having been signed by the party making the transfer, nor by any attorney authorized by writing, under her hand and seal, it is contended that it is altogether inoperative, that the stock is not taken out of Mrs. Keating's name, but still remains hers as fully as if no transfer whatever had been made thereof; and the case of *Davis v. the Governor and Company of the Bank of England*\*, is cited and relied upon as an authority directly in point in support of such proposition. But we hold

it to be altogether unnecessary on the present occasion to discuss the proposition above advanced, or the authority of the case cited in support of it ; for although the proposition may be true to its full extent, and the authority of the case above cited in support of it may be free from all doubt or difficulty, still, under the circumstances stated in the special verdict, we are of opinion that the Plaintiff below is at liberty to abandon and give up all claim to her former stock so standing in her name, and to sue for the money produced by the sale of such stock as for her own money, which we think has been sufficiently traced into the hands of the Defendants below.

It is unnecessary to enlarge upon the extreme difficulty, or, more properly, impracticability under which Mrs. Keating would be placed, if, as matters now remain, she should elect either to receive the dividends or to sell her stock, it is sufficient to observe that the special verdict finds that when stock is sold, an entry of the transfer is made in the bank books, and the name of the purchaser is substituted for that of the seller. The dividend warrants are thenceforth made out in the purchaser's name who receives the dividend, and the seller's name is no further noticed. Now it is obvious, that a transfer under a forged power, or by an impostor, has all the appearance, and unless impeached by the genuine stockholder to the extent to which the same can be impeached, the same consequences, as a genuine transfer : the transferee's name is entered in the Bank books as the stockholder, the dividend warrants are made out in his name, and he, as holder of the warrant, has the right to insist upon payment of the dividends ; and in this par-

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ticular case the special verdict finds, "that it is  
"not possible to distinguish the accounts to the  
"credit of which the Plaintiff's stock so sold  
"under power of attorney now stands." If the  
Plaintiff below, therefore, were to apply to receive  
payment of the dividends, or to sell the stock,  
she would be met with a difficulty insuperable in  
fact: although the stock may in contemplation of  
law still be vested in her, it is certain that she  
could not either receive the dividend or sell the  
stock, until she had first compelled the Bank to  
purchase *de novo* in her name, an equal quantity  
of the same stock. Is she compelled to adopt this  
circuitous process, or is she at liberty to abandon  
all further concern with her stock, and to consider  
the price which was paid by the purchaser for that  
which was her stock to be her money, and to fol-  
low it into the hands of the present Defendants  
below? This, as before stated, appears to us to be  
the question reserved for our consideration; and  
upon this question we think her at liberty to give  
up the pursuit of the stock itself, and to have re-  
course to the price received for it, unless any of  
the objections which have been urged at your Lord-  
ships' bar, should be allowed to be available under  
the particular circumstances of this case.

The general proposition—that where a party who  
has been injured has different remedies against dif-  
ferent persons, he may elect which of them he will  
pursue—is not called in question. If the goods of  
A. are wrongfully taken and sold, it is not dis-  
puted that the owners may bring trover against  
the wrong doer, or may elect to consider him as  
his agent, may adopt the sale and maintain an  
action for the price; but it is objected that such



general rule will not apply to the present case on various grounds of objection which have been advanced on the part of the Defendants in the action.

Those objections appear to resolve themselves substantially into four. First, it has been urged that the transfer in this case being an act not voidable only, but absolutely void, it is incapable of being confirmed by any voluntary election of the party who has made it. Secondly, that, at all events, in this case, such election is taken away upon grounds of public policy; for that the sale of the stock having been made through the medium of a felony, to allow the maintenance of this action, would in effect be to affirm a sale completed through a felony, and would give the Plaintiff a right of action, arising immediately out of the felony itself. Thirdly, that it does not appear from the facts found in the special verdict, that the money produced by the sale of the stock came to the hands of the present Defendants under such circumstances as would constitute it money had and received by the Defendants below to the use of the Plaintiff. And, lastly, that, by the subsequent transactions between the Plaintiff and the Bank of England, she has lost any right of action against the Defendants, if she ever possessed it.

The first objection appears scarcely to apply to the present state of facts. It is urged at the bar that a lease under a power being void on account of a non-compliance with the terms of the power, or a lease under the enabling statutes being void, on account of the non-observance of the requisites contained in those acts, such void lease cannot be set up or confirmed by any act of the lessor; but

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these instances only prove that acts done to confirm the lease itself are nugatory, and that the estate of the lessee remains precisely the same as before such acts of confirmation. Here the former owner of the stock does not seek to confirm the title of the transferee of the stock. No act done by her is done *eo intuitu*; it is perfectly indifferent to her whether the right of the transferee to hold the stock is strengthened or not. She is looking only to the right of recovering the purchase money; and if, in seeking to recover that, she does not by her election make the right of the purchaser weaker, it can be no objection that she does not make it better. In fact, however, the interest of the purchase of the stock is so far collaterally and incidentally strengthened, that, after recovering the price for which it was sold, she would effectually be estopped from seeking any remedy against, or questioning in any manner the title of, the purchaser of the stock.

As to the second objection, it may be admitted that the civil remedy is in all cases suspended by a felony where the act complained of, which would otherwise have given a right of action to the Plaintiff, is a felonious act. Upon this ground Mrs. Keatinge would have lost any right of action which she could otherwise have had against Fauntleroy, for the wrongful sale of her stock without her authority, by reason of the felony committed by him, as the means of selling the stock. But this principle does not apply to the present case, upon two grounds. First, none of the present Defendants had any privity or share whatever in the felonious act. There is, therefore, no felony committed by them in which the civil right arising against them, supposing

it to exist, can merge or be suspended: they are innocent third persons. And, secondly, Fauntleroy, the person guilty of the forgery, had suffered the extreme penalty of the law before the action was brought; not, indeed, for the commission of this particular forgery, but of another of the same nature; and the present Plaintiff having given to the Bank all the means in her power for prosecuting the felon, it became impossible, without any default in her, that he should be prosecuted and punished for this felony. The case, therefore, falls within the principle laid down by, though not within the precise circumstances of, the two cases that were cited at the bar: *Dawkes v. Coveleigh\**, and *Crosby v. Leng*. †

As to the argument, that to affirm this sale is to affirm a felony, that point may be considered to have been decided in *Stone and another v. Marsh and others*‡; with which decision we entirely concur. Lord Tenterden in giving the judgment of the Court of King's Bench in that case, puts the question in page 565. of that report in so clear a point of view, that it will be better to transcribe his words:—"It was contended that the maxim "of ratifying a precedent unauthorised act, and "taking the benefit of it, cannot apply to a void or "felonious act, and that here the plaintiffs were "seeking to ratify the felonious act of Fauntleroy, "and were making that act the ground of their "demand. In this latter assertion lies the fallacy "of the defendants' argument. The assertion is "incorrect in fact; the plaintiffs do not seek to "ratify the felonious act: they do not make that

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\* *Styles' Rep.* 347. † 12 *East*, 409. ‡ 6 *B. & C.* 551.

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“ act the ground of their demand. The ground of  
 “ their demand is the actual receipt of the money  
 “ produced by the sale and transfer of their an-  
 “ nuities. The sale was not a felonious act; neither  
 “ was the transfer nor the receipt of the money.  
 “ The felonious act was antecedent to all these,  
 “ and was complete without them, and was only  
 “ the inducement to the Bank of England to allow  
 “ the transfer to be made.” We think, therefore,  
 upon the reasons above given, that this second ob-  
 jection falls to the ground.

But it is objected, thirdly, that the proceeds of the  
 sale of the stock never came into the hands of the  
 Defendants so as to be money received by them to  
 the use of the Plaintiff; and the consideration of  
 this objection involves two questions: First, did the  
 money actually come into the possession of the  
 Defendants? Secondly, if it ever was in their pos-  
 session, had the Defendants the means of knowledge  
 whilst it remained in their hands that it was the  
 money of the Plaintiff, and not the money of  
 Fauntleroy? As to the first point, the special ver-  
 dict finds expressly that Simpson, the broker, paid  
 the sum of 6013*l.* 2*s.* 6*d.*, being the amount of the  
 sum received from Tarbutt (deducting one half of  
 the usual commission,) by a check payable to Marsh  
 and Company, into the hands of Martin and Com-  
 pany, to the account of Marsh and Company. At  
 the precise time of such payment therefore there  
 can be no doubt that it was as much money under  
 their control as any other money paid in at Martin  
 and Company's by any customer under ordinary  
 circumstances. The house of Marsh and Company  
 might have drawn the whole of the balance into their  
 own hands. If the same money had been paid into

Martin and Company's as the produce of the Plaintiff's stock, sold under a genuine power of attorney, it would unquestionably have been received by all the Defendants to the use of the Plaintiff. It would not the less be money received by the partners of the firm, because (as found in the special verdict) it was entered in the account as "cash per "Fauntleroy," or because it never appeared in the house-book or any other books of Marsh and Company, but only in the pass-book of that firm, with Martin and Company, or because it never came into the yearly balancing of the house of Marsh and Company, or in any other manner into their books. Those several circumstances prove no more than that Fauntleroy, one of the partners, deceived the others by preventing the money from being ultimately brought to the account of the house; but as between them and the person by the sale of whose stock it was produced, we think the fraud of their partner, Fauntleroy, in the subsequent appropriation of the money affords no answer, after it has once been in their power; and that it was so, appears to be distinctly stated in the special verdict.

But it is urged that the present Defendants had no knowledge that the money was the property of the Plaintiff, being perfectly ignorant, as the special verdict finds, of the commission of the forgery, of the sale of the stock, or the payment of the produce of such sale into their account at Martin and Company's. It must be admitted that they were so far imposed upon by the acts of their partner as to be ignorant, that the sum above mentioned was the produce of the Plaintiff's stock; but it is equally clear that the Defendants might have discovered the payment of the money, and

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the source from which it was derived, if they had used the ordinary diligence of men of business. If they had not the actual knowledge, they had all the means of knowledge; and there is no principle of law upon which they can succeed in protecting themselves from responsibility in a case wherein if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires.

As to the last ground of objection to the Plaintiff's right to recover, it is argued that by the agreement into which she entered with the Bank, and under which she has received from the time of the sale the dividends which would have become due, she has disaffirmed the sale with a full knowledge of all the facts, and therefore cannot now be allowed to set it up as a valid sale. But it appears to us that it is sufficient to look at the terms of such agreement to give an answer to the objection. That agreement expressly secures to Mrs. Keating the right to have recourse either to the Bank or the present Defendants for her remedy, as she may be advised. It therefore leaves the question, whether the sale is affirmed or not completely in uncertainty, until she makes her election to have recourse to the one or the other; and the agreement is one which causes no disadvantage to the right of the Defendants, who, if liable, can only be liable once to the payment of money actually received, whether the Bank have in the mean time advanced the dividends or not.

Upon the whole, therefore, we beg to state our opinion to be, that, upon the question which has been proposed to us by your Lordships, A. has the right to recover the produce of her stock

against the surviving partners of the firm, who received it under the circumstances stated in the special verdict in an action for money had and received to her use.

The Lord Chief Justice of the Common Pleas desires to have it expressly understood, that he fully concurs in the opinion now delivered.

In consequence of this opinion, the judgment of the Court below, upon the motion of the Lord Chancellor, was affirmed without costs.

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## ENGLAND.

(COMMON PLEAS; KING'S BENCH.)

The MAYOR and BURGESSES }  
of Lyme Regis                -        . } *Plaintiffs in Error.*

HENRY HOSTE HENLEY, Esq. *Defendant in Error.*

By letters patent, 10 Cha. 1.; the borough or town and pier quay or cob of Lyme Regis, with all the privileges, &c., to the town and pier quay belonging, were granted and confirmed to the Mayor and Burgesses of Lyme Regis, and their successors, to hold, &c. in fee farm for ever. The letters patent provided, that the Mayor and Burgesses and their successors should, at their own cost, thenceforth from time to time for ever, well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient, all and singular the buildings, banks, sea-shores, and all other mounds and ditches within or belonging to the borough, or situate between the borough and the sea, and also the pier quay. The Mayor was by the letters patent appointed clerk of the market within the borough, with the fines, &c. belonging to that office; and to the Mayor and Burgesses was granted a license to dig stones and rocks in any places within the borough out of the sea, and on the sea-shore, for the reparation of the port, and the building called the pier quay, and other necessary reparations and common works of the town and borough and the building aforesaid.

In an action on the case against the corporation, the declaration set forth the letters patent, and that they were accepted by the corporation, and that the corporation had thenceforward enjoyed the benefits and profits of the letters patent; and that the Plaintiff was possessed of a house and land within the borough, and abutting on the sea-shore; and that there was at the time of the sealing and acceptance of the letters patent, a sea-bank between the borough and the sea, which formed, and of right ought to be, a protection to the house



and land of the Plaintiff, and which sea-bank the Defendants, by virtue of the letters patent, and their acceptance, were liable to repair at their own cost as often as might be necessary; and that for want of such repair the house and land of the Plaintiff was inundated and injured:

Held, after verdict upon a plea of not guilty, that this declaration disclosed a sufficient cause of action.

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**T**HIS was a writ of error upon a judgment in the Court of Common Pleas\*, affirmed by the Court of King's Bench.†

In Hilary Term 7 and 8 Geo. IV., an action was brought by the Defendant in error against the Plaintiffs in error, in the Court of Common Pleas, for the non-performance of certain repairs directed by their charter, whereby special damage had been sustained. The declaration in the first count stated as follows:—For that whereas heretofore, and before the committing of the grievances by the said Defendants, as hereinafter next mentioned, to wit, on the 20th day of June, in the 10th year of the reign of our late sovereign Charles I., to wit, at the parish of Lyme Regis, in the county of Dorset, our said late Lord Sovereign, by his certain letters patent, duly sealed in that behalf—after reciting as therein is recited—did for himself, his heirs and successors (amongst other things) give, grant, and confirm to the mayor and burgesses of Lyme Regis aforesaid, and their successors, the borough or town of Lyme Regis, and also all that the building called the pier quay or cob of Lyme Regis, with all and singular the liberties, privileges, profits, franchises, and immunities to the same town, or to the said pier quay or cob, in any wise howsoever

\* 5 Bing. 91.

† 3 Barn. & Ad. 77.

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belonging or appertaining: to have, hold, and enjoy the aforesaid borough or town, and also all that the building aforesaid, called the pier quay or cob of Lyme Regis, with all and singular the liberties, franchises, privileges, and immunities, to the aforesaid mayor and burgesses of the borough aforesaid, and their successors: to the only and proper use and behoof of the said mayor and burgesses of the borough aforesaid, and their successors, in fee farm for ever; yielding of fee farm to our said late Sovereign Lord Charles I., his heirs and successors, of and for the aforesaid borough or town, with its liberties and franchises, as in the said letters patent in that behalf mentioned. And our said late Sovereign Lord Charles I. did further, of his abundant special grace, and of his certain knowledge and mere motion, for himself, his heirs, and successors, pardon, remise, and release to the same mayor and burgesses of the borough or town aforesaid, and their successors for ever, twenty-seven marks, parcel of thirty-two marks of the farm of the same borough and the liberties thereof, anciently by letters patent, or in any other manner due: Our said late Lord King Charles I., willing not that the same mayor and burgesses of the borough of Lyme Regis aforesaid, in the county of Dorset aforesaid, or their successors, or either or any of them, should be charged of the further portion of the aforesaid farm of thirty-two marks, besides the aforesaid five marks, by our said late Lord King Charles I., or by his heirs, justices, sheriffs, escheators, clerks of the market, or bailiffs or ministers of him, the late King Charles I., his heirs or successors whomsoever, or of the arrearages thereof; but that they

and their successors, against our said late King Charles I., his heirs and successors, should be thereafter acquitted, and from time to time for ever discharged of the aforesaid yearly twenty-seven marks, parcel of the aforesaid yearly thirty-two marks, any statute, act, ordinance, provision, or any charters or letters patent theretofore made, by any of our said late King Charles I.'s progenitors, to the same mayor and burgesses, or their predecessors, to the contrary thereof in any wise notwithstanding. And that the aforesaid mayor and burgesses of the borough of Lyme aforesaid, and their successors, all and singular of the buildings, banks, sea-shores, and all other mounds and ditches within the aforesaid borough of Lyme, or to the aforesaid borough in any wise belonging or appertaining, or situate between the same borough and the sea, and also the said building there called the pier quay or the cob, at their own costs and expenses thenceforth, from time to time for ever, should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient. And further, of his special grace, and of his certain knowledge and mere motion, our said late King Charles I., by the said letters patent, for himself, his heirs and successors, did grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the mayor of the same borough for the time being for ever thereafter, should be clerk of the market within the borough or town aforesaid, and the liberties and precincts of the same; and that the mayor of the borough aforesaid for the time being should do and execute, and might and should be able to do and execute there

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for ever, all and whatsoever that which to the office of clerk of the market of our said late King Charles I.'s household there pertained to be done and performed; so, nevertheless, that the clerk of the market of our said late King Charles I.'s household for the time being, together with the aforesaid mayor for the time being, might exercise the office abovesaid, and intromit, when he would, to do any thing which pertained to the office of clerk of the market there, in the borough aforesaid, and the liberties and precincts of the same. And further, our said late King Charles I., of his abundant special grace, and of his certain knowledge and mere motion, for himself and his heirs and successors, did, by the said letters patent, give and grant to the said mayor and burgesses of the said borough and town aforesaid and their successors, all and singular the fines, amerciaments, and sums of money, before the said clerk of the market of the town or borough aforesaid, or the clerk of the market of the said late King Charles I., or his deputy, by either or any of the inhabitants of the borough or town aforesaid, after the date and making of the said letters patent, forfeited, or thereafter to be forfeited and assessed in the same borough, to have and enjoy to the same mayor and burgesses of the borough aforesaid, and their successors, to the use of the aforesaid mayor and burgesses, and their successors for ever, of the said late King Charles I.'s gift, without account, or any other thing for the same to our said late King Charles I., his heirs, or successors, in any wise howsoever to be rendered or paid, and to be levied by their own servants and ministers, without estreats thereof to be sent to the Exchequer of the said late King Charles I.

And, moreover, of his more ample special grace, and of his certain knowledge and mere motion, the said late King Charles I. did will, and by the said letters patent did for himself, his heirs and successors, give and grant to the said mayor and burgesses of the borough aforesaid, and their successors, full power, authority, and license from time to time for ever to dig stones and rocks in any places whatsoever, within the borough and parish of the town aforesaid, out of the sea and on the sea-shore, in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building aforesaid, called the pier quay or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the buildings aforesaid. And the said late King Charles I. did also, by the said letters patent, will and grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the same mayor and burgesses and their successors should have, hold, use, and enjoy, and might and should be able fully, freely, and entirely to have, hold, use, and enjoy for ever, all the liberties, free customs, privileges, authorities, acquittances, and licenses aforesaid, according to the tenor and effect of the said letters patent, without the let or impediment of the said late King Charles I., his heirs or successors whomsoever, our said late King Charles I. willing not that the same mayor and burgesses and inhabitants of the borough or town aforesaid, or either or any of them, by reason of the premises, or either or any of them, should be thereof hindered, molested, aggrieved, or vexed, or in any thing disturbed by

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him, the said late King Charles I., or by his heirs, or his or their justices, sheriffs, escheators or other the bailiffs or ministers of the said late King Charles I., his heirs or successors whomsoever ; which said letters patent the mayor and burgesses of the borough aforesaid, afterwards — to wit, on the same day and year aforesaid — to wit, at the parish aforesaid, in the county aforesaid, duly accepted, and the same thence hitherto have been, and still are, one of the governing charters of the said borough — to wit, at the parish aforesaid, in the county aforesaid. And the said Plaintiff further says that the said mayor and burgesses, from the time of their acceptance of the said letters patent, hitherto have, had, held, received, and enjoyed all the benefits, profits, and advantages granted to them by such letters patent, as aforesaid. And whereas also, before, and at the time of the committing of the grievances by the said Defendants, as hereinafter next mentioned, the said Plaintiff was lawfully possessed of and in divers, to wit, five messuages, five cottages, five buildings, and divers, to wit, twenty closes of land with the appurtenances, situate and being in the county aforesaid, to wit, in the borough aforesaid. And whereas also, before, and at the time of the committing of the grievances by the said Defendants, as hereinafter next mentioned, divers, to wit, five other messuages, five other cottages, five other buildings, and divers, to wit, twenty closes of other land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough aforesaid, were in the possession and occupation of divers persons, as tenants thereof respectively to the said Plaintiff ; the reversion thereof then and still belonging to the said Plain-

tiff—to wit, at the parish aforesaid, in the county aforesaid—all which said several messuages, cottages, buildings, and closes of land, with the appurtenances before and at the times of the committing of the several grievances by the said Defendants, as hereinafter next mentioned, were abutting on or near the sea-shore there—to wit, at the parish aforesaid, in the county aforesaid. And whereas also, before and at the time of sealing of the said letters patent, and acceptance thereof, as aforesaid, by the said mayor and burgesses, and also at the time of the committing of the several grievances by the said Defendants, as hereinafter next mentioned, divers, to wit, ten buildings, ten banks, ten sea-shores, and ten mounds, had been, and were then respectively standing and being within the borough of Lyme Regis aforesaid; and divers, to wit, ten other buildings, ten other banks, ten other sea-shores, and ten other mounds, had been, and respectively were belonging and appertaining to the said borough; and divers, to wit, ten other buildings, ten other banks, ten other sea-shores, and ten other mounds, had been, and were at those times respectively standing, and being, and situate between the said borough and the sea, to wit, in the borough aforesaid; all which said buildings, banks, sea-shores, and mounds respectively, at the times of the committing of the several grievances by the said Defendants, as hereinafter next mentioned, were near to, and then and there constituted and formed, and were a protection and safeguard, and still of right ought to form and be a protection and safeguard to the said several messuages, cottages, buildings, and closes of land, with the appurtenances aforesaid, and then and

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there hindered and prevented, and still of right ought to hinder and prevent, the sea, and the waves and waters thereof, from running or flowing in, upon, against, or over the said several messuages, cottages, buildings, and closes of land aforesaid; and all which buildings, banks, sea-shores, and mounds, the said Defendants, at the times of the committing of the several grievances by them, as hereinafter next mentioned, were under, and by virtue and in pursuance of the aforesaid letters patent, and the acceptance thereof, as aforesaid, liable to, and ought, at their own proper costs and charges, well and sufficiently to have repaired, maintained, and supported, and still are liable to, and ought at their own proper costs and charges, well and sufficiently to repair, maintain, and support, when and so often as it should or might have been, or shall or may be necessary or expedient so to do, so as to prevent damage or injury to the said messuages, cottages, buildings, and closes of the said Plaintiff, by the sea, or the waves or waters thereof, to wit, at the parish aforesaid, in the county aforesaid. Yet the said Defendants, well knowing the premises, and not regarding the said letters patent, nor their duty in that behalf, but contriving, and wrongfully and unjustly intending to injure, prejudice, and aggrieve the said Plaintiff, and to deprive him of the use and benefit of his several messuages, cottages, buildings, and closes in this count first above mentioned, and also to injure, prejudice, and aggrieve him, the said Plaintiff, in his reversionary interest of and in the said messuages, cottages, buildings, and closes, in this count secondly above mentioned, so being in the possession and occupation



of the said persons, as tenants thereof to him, the said Plaintiff, as aforesaid; and in which he, the said Plaintiff, was so interested, as aforesaid, heretofore, to wit, on the 1st day of January, in the year of our Lord 1821, and from thence for a long space of time, to wit, continually until the commencement of this suit, to wit, at the parish aforesaid, in the county aforesaid, wrongfully and unjustly suffered and permitted the said buildings, banks, sea-shores, and mounds, to be and continue; and the same, during all the time aforesaid, were ruinous, prostrate, fallen down, washed down, out of repair, and in great decay, for want of due, needful, proper, and necessary repairing, maintaining, and supporting of the same, to wit, at the parish aforesaid, in the county aforesaid; by means of which said several premises, the sea, and the waves and waters thereof, afterwards, to wit, on the same 1st day of January, in the year of our Lord, 1821, and on divers other days and times between that day and the commencement of this suit, to wit, at the parish aforesaid, in the county aforesaid, ran and flowed with great force and violence in, upon, under, over, and against the said several messuages, cottages, buildings, and closes of the said Plaintiff, and in which he was so interested, as aforesaid; and thereby then and there greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled, and destroyed the said several messuages, cottages, and buildings, and the materials of the same messuages, cottages, and buildings, together with divers, to wit, 10,000 cart loads of the earth and soil, and divers, to wit, five acres of the said several closes, were washed and carried away, to wit, at the parish

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aforesaid, in the county aforesaid ; by means of which said several premises, the said Plaintiff not only lost, and was deprived of the use, benefit, and enjoyment of his said messuages, cottages, buildings, and closes in this count first above mentinoed, but was also thereby then and there greatly injured, prejudiced, and aggrieved in his reversionary estate and interest of and in the said several messuages, cottages, buildings, and closes, in this count secondly above mentioned, so being in the posession and occupation of the said persons, as tenants thereof to the said Plaintiff, as aforesaid, and in which the said Plaintiff was so interested, as aforesaid. And the said Plaintiff hath been and is, by means of the premises aforesaid, otherwise greatly injured and damnified, to wit, at the parish aforesaid, in the county aforesaid.

There were other counts, stating a liability to the same repairs by prescription ; and others, stating it by reason of the possession of certain closes. The Defendants below pleaded the general issue.

The cause came on to be tried before Mr. Justice *Littledale* at the spring assizes for the county of Dorset, in 1828, when the jury found a verdict for the Plaintiff below, on the first count of the declaration, with 100*l.* damages ; and were discharged from giving any verdict upon the other counts.

In Easter Term, 1828, a motion in arrest of judgment was made, in the Court of Common Pleas, by the Plaintiffs in error ; but in Trinity Term, 1828, judgment was given for the Defendant in error, with 100*l.* damages, and costs 675*l.* 10*s.*

The Plaintiffs in error thereupon brought a writ of error, returnable in the Court of King's Bench, where, in Michaelmas Term, 1831, the judgment

of the Court of Common Pleas was affirmed by the judgment of Lord *Tenterden*, and two other judges of that court, but without the express concurrence of the remaining judge.

Upon that judgment the present writ of error was brought.

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For the Plaintiff in error, Mr. Serjeant *Mere-  
wether* and Mr. *Erle*.

Upon the record there is nothing to shew a liability to repair by reason of tenure. The quotations in the court below from Callis are of doubtful authority, and controlled by other passages in the same author.\* The main question is, whether the King can, by charter, create such a liability being a new duty; for it is not in proof that there was any liability to repair the sea walls before the charter, nor is there any authority to shew that the acceptance of a grant from the King could raise such a liability. If the grantees fail in the performance of the condition the King may revoke the grant.† The judgment in the courts below rests upon the assumption, that the corporation is liable to indictment for non-repair. But if the occupiers of land abutting on the sea are liable in the first place, according to the opinion of Callis ‡, an agreement to undertake that liability even by a corporation aggregate upon consideration, and in a matter of public interest, will not subject the parties to indictment: *Rex v. Mayor of Liverpool* §, nor release those who were before liable: *Regina v. the Duchess of Buccleugh*.|| The charter operates merely as a

\* See Callis on Sewers, pp. 2. 115. 117, 118.

† Rolls Abr. Com. Dig. tit. Franchise.

‡ P. 115.

§ 3 East, 86.

|| 1 Salk. 358.

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private covenant between the King and the corporation.

There is no authority for the liability here claimed. The cases cited by the Court of King's Bench, in giving judgment in this case, relate to liabilities by reason of *Prescription*, or of *Tenure*, or of *Acts of Parliament*, or of *Nuisances to Public Rights* \*; and not to any liability arising from the acceptance of a grant from the King. *Popham v. the Prior of Breamore*†, *Keighley's Case*‡, *the Mayor of Lynn v. Turner*§, *Churchman v. Tunstall*||, the case of a common ferryman, and *Paine v. Partrich*¶, were all cases founded on prescription and immemorial usage. That the Plaintiffs are liable because they are a corporation is argued from an expression in *Russell v. the Men of Devon*.\*\* It is a mere *dictum*, and, as a decision, would be opposed to *Rex v. the Mayor of Liverpool*††, and *Harris v. Baker*‡‡. The cases of public officers stand upon the specialty of acts of Parliament, and have no application to such a case as this.

The remedies for the non-performance of such repairs as are directed by the charter of Charles I., are pointed out by the act of 43 Elizabeth, chap. 4., and by numerous authorities§§, to be either a suit in the Court of Chancery, to compel a proper

\* Vide as to Prescription, *Paine v. Partrich*, Carth., 194., Tenure, 12 H. VII. 18. Acts of Parliament, *Rex v. Inhabitants of Kent*, 13 East, 220.; *Rex v. Inhabitants of Lindsay*, 14 East, 317.; *Rex v. Kerrison*, 3 M. and S. 526. Nuisances to public Rights, *Rex v. Stoughton*, 2 Saund. 157.

† 11 Hen. 4. 82.

‡ 10 Rep. 139 a.

§ Cowp. 86.

|| Hardr. 162.

¶ Show. 255.; Cuth. 191.

\*\* 2 T. R. 667.

†† 3 East, 86.

‡‡ 4 M. & S. 27.

§§ 4 Viner, 476. and the Cases there collected Co. Dig. Franchises, Y. 3.

application of the funds granted, or a proceeding on the part of the King for a forfeiture of the franchise.

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It appears by the statute, 1. Geo. IV., c. 99., for improving and maintaining the harbour pier or cob at the port and borough of Lyme Regis, that the funds granted by the charter are inadequate to the repairs directed: it seems, therefore, absurd to suppose that any private prosecutor or Plaintiff should be able to compel the application of the funds granted by the King for public purposes, to repairs beneficial to himself individually, while repairs required for the general protection of the town and port are left undone. If the proper remedies were adopted, the application of the funds granted according to the intention of the King in granting them, would be a defence.

The declaration states the banks and mounds to be a protection to the property of Mr. Henley and not of the public. The complaint is, therefore, of a private and not a public injury.

For the Defendant in error, Mr. *Follett*.

The benefits under the charter, remission of rent and license to dig stones, which the corporation has enjoyed ever since the grant, were the consideration for the performance of the duty, they cannot accept the grant and reject the burthen: *The King v. Westwood*\*, *Brett v. Cumberland*.† The charter has imposed a duty in which the public are interested. For the neglect of that duty indictment will lie at the suit of the public, or an action by a private person: *Herbert v. Paget*‡, *Lane v. Cotton*§,

\* 4 B. & C. 781. 4 Bligh, N. S. 213.

† Cro. Jac. 399. 521.

‡ 1 Lev. 64.

§ 1 Salk. 17.

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Com. Dig. Action on Case, A. 2, A. 3, *Peter v. Kendal*.\*

It is a general principle of law, that every breach of public duty or neglect of what the party is bound to perform, working wrong or loss to another, is injurious and actionable: *Sutton v. Johnstone*, 1 Term. Rep. 509; *Russell v. Men of Devon*, 2 Term Rep. 667.

On this principle is founded the right of action against sheriffs, justices, constables, &c. against a keeper of records, *Hubert v. Paget*†; against a ferryman, for neglecting to keep his boat, *Payne v. Partrich*‡; *Churchman v. Tunstal*§; and against a corporation for not repairing a creek of the sea, *Mayor of Lynn v. Turner*.|| By the charter granted to the Plaintiffs, the King *wills* that the Plaintiffs shall repair the sea walls: they accept the chapter, and by their acceptance the words of the King enure as a covenant by the Plaintiffs: *Brett's Case*.¶ They neglect their duty, by which the Defendant sustains a serious loss; and this gives him a right of action against them.

The duty imposed affects the public interest, and the charter is therefore granted in exercise of the royal prerogative, and is not like the indenture of subjects. The Plaintiffs are liable by reason of their tenure of the town or borough: *Callis*, p. 117. They are also liable by reason of their possession of the walls themselves: *Callis*, p. 115. The declaration sufficiently alleges both these liabilities, and does not aver an obligation more extensive than the duty required by the charter. That

\* 6 B. & C. 703.

† Show. 255.; Carth. 191.

|| Cowp. Rep. 86.

† 1 Lev. Rep. 64.

§ Hadr. 163.

¶ Cro. Jac. 399.

they were in possession of the borough, the walls and banks, cannot be denied after verdict. The grant and the condition are set forth in the declaration ; the consideration for the duty appears ; and the party injured by neglect of the duty has a right of action : *Keighley's Case*.\* In *The King v. Kerri-son* †, the obligation annexed to the grant did not appear. A corporation may be bound to the performance of a public duty without holding land. But in this case land was granted by the charter ; and they come under the strict liability *ratione tenuræ*.

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At the conclusion of the argument the following question was proposed by the House, for the opinion of the Judges : —

The declaration in an action on the case against a corporation states, that before the committing of the grievances by the Defendants, the King, by his letters patent duly sealed, did give, grant, and confirm to the corporation and their successors, the borough or town of Lyme Regis, also all that the building called the pier quay or cob of Lyme Regis with the liberties, franchises, privileges, and immunities to the same town, pier quay or cob in any wise belonging to the only proper use, and behoof of the corporation, in fee-farm for ever, yielding of fee-farm to the King as in the letters patent mentioned ; and that the King thereby released to the corporation part of an ancient sum of money due from them annually, willing that the corporation should be thereof acquitted, and that the corporation and their successors, all and singular of the buildings, banks, sea-shores, and all other mounds and ditches

\* 10 Rep. 139.

† 3 M. & S. 526.

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within the said borough, or to the said borough in any wise belonging or appertaining, or situate between the said borough and the sea, and also the said building called the pier quay or the cob, at their own costs and expenses thenceforth from time to time for ever, should well and sufficiently repair, maintain, and support as often as it should be necessary or expedient: that the King also by the same charter granted fines and amerciaments before the clerk of the market without account, and a license to dig stones without the borough and parish of the town out of the sea and on the sea-shore, for the reparation and amendment of the port and the said pier quay or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the buildings aforesaid. The declaration then avers that the charter was duly accepted, and from thence hath been, and still is, a governing charter of the borough, and that the corporation from the time of that acceptance hitherto, have had, held, received and employed all the benefits, profits, and advantages granted to them by the said letters patent. It then proceeds to state that the Plaintiff was at the time of the committing of the grievances, lawfully possessed of a messuage and land in the county aforesaid, to wit in the said borough which were before and at those times abutting on or near the sea-shore. That a building, bank, and sea-shore within the borough, a building, bank, or sea-shore belonging and appertaining to the borough, and a building, bank, or sea-shore, situate between the borough and the sea, all which were there at the time of the sealing and acceptance of the letters patent, and at the



time of the committing of the grievances, and at the last mentioned time, were near to, and constituted and formed, and were a protection and safeguard, and still of right ought to be so, to the Plaintiff's messuage and land aforesaid; and then hindered the sea from flowing upon and over that messuage and land; and which buildings, banks, sea-shores and mounds, the Defendants were at those times by virtue of the said letters patent and acceptance, liable to repair at their own proper costs and charges, as often as it might be necessary or expedient to do so. A breach is then assigned that the corporation wrongfully permitted the said buildings, banks, sea-shores, and mounds, to be out of repair for want of due, proper, and necessary repairing of the same by means of which, the Plaintiff's house and land was inundated and injured.

After a verdict upon a plea of not guilty, is this declaration good, and does it disclose a sufficient cause of action by the Plaintiff against the corporation?

The further consideration of the case was then adjourned.

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On the 25th of June, the opinion of the Judges was read in the House by Mr. Justice *Park*.

After stating the question proposed, it proceeded as follows:—

In order to make this declaration good, it must appear, first, that the corporation are under a legal obligation to repair the place in question; secondly, that such obligation is matter of so general and public concern, that an indictment would lie against the corporation for non-repair; thirdly,

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that the place in question is out of repair, and, lastly, that the Plaintiff has sustained some peculiar damage beyond the rest of the King's subjects by such want of repair.

The third and last requisites are admitted to be averred in this declaration, and with sufficient words, at least after verdict. The doubt in this case arises upon the first and second requisites. With regard to the first, it is argued that the corporation have not, by acceptance of the charter, stated in the declaration, incurred any legal obligation whatever as to the repair of the place in question; that the charter does not contain a grant on condition that the corporation shall repair, but merely an expression of the King's will that they shall repair.

Looking at the words of the charter as stated in the declaration, we are of opinion that it does cast upon the corporation an obligation to repair; which they by accepting the charter have adopted. The King grants and confirms to the corporation, the town or borough, and the pier, with the liberties, franchises, privileges, and immunities to the same belonging in fee-farm for ever, yielding of fee-farm to the King as therein mentioned; and the King remits part of an ancient rent, willing that the corporation should be thereof acquitted; and then the charter goes on in these words: — “ And “ that the corporation and their successors, all and “ singular of the buildings, banks, and sea-shores, “ and all other mounds and ditches within the said “ borough, or to the said borough in any wise be- “ longing, or appertaining, or situate between the “ said borough and the sea, and also the said build- “ ing called the pier quay or the cob at their own

“ costs and expenses thenceforth from time to time  
 “ for ever, should well and sufficiently repair, main-  
 “ tain, and support as often as it should be neces-  
 “ sary or expedient.”

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Now these words are undoubtedly an expression of the King's will, that the corporation should repair ; but they are not the less a condition on that account : on the contrary, they show the consideration for the grant, the motive inducing the King to make the grant, and consequently the terms and conditions on which the grant was to be accepted. What effect such words might have in a grant from one subject to another, it is not necessary to determine : such a grant between subjects is matter of contract and bargain strictly so speaking ; but a grant from the King to a subject is matter of favour, and the language used will be found to vary accordingly. Independently of authorities we should have come to this conclusion : but the case of *Brett v. Cumberland* \* seems to us to be decisive of question. That was an action of covenant by the assignee of King James I. against the executors of the lessee of a mill under letters patent of Queen Elizabeth sealed with her seal only, and containing these words : — Et prædictus Willielmus executores et assignati sui prædictum molendinum et domus et ædificia inde, sufficienter reparabunt. The first question was whether these words in the letters patent, to which the Queen's seal only was affixed, shall enure as a covenant to bind the lessee and his assigns ; and it was resolved “ that it should : “ for the lessee takes thereby because it is matter of “ record. Although, in show, they are the words of “ the lessor only, yet he accepting thereof and en-

\* Cro. Jac. 521.

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“joying it, it is as well his covenant in fact, and “shall bind him as strongly as if it had been a “covenant by indenture.” So in the charter in question, the words are in show, the words of the King only; but the corporation having accepted the charter, and enjoyed the benefits of it, as is averred in the declaration, they are as strongly bound as if they had covenanted expressly by an indenture.

The second requisite is in truth that upon which this case wholly turns; viz., that the obligation must be a matter of so general and public concern, that an indictment will lie for the breach of it. Now this depends principally upon the construction which ought to be put upon the words of the charter. They are undoubtedly of a very general nature, — “All and singular the buildings, banks, “sea-shores, and all other mounds and ditches “within the said borough, or to the said borough “belonging, or situate between the said borough “and the sea.” It is asked, Do these words embrace every little ditch or bank within the limits of the borough whether public or private; and if not, where is the limit? The answer is, that they embrace only such buildings, banks, sea-shores, mounds, and ditches, within or belonging to the borough, or situate between the borough and the sea, as form part of the defences and safeguard of the borough against the encroachments of the sea. This may be gathered from the context, from the word “sea-shores,” from the expression “situate “between the borough and the sea,” and from the obvious intention and scope of the charter as stated in the declaration.

It seems to us that such construction and limitation of the words is necessary in order to give this

part of the charter any meaning, and that no violence is done either to the grammatical or reasonable sense of the words by such construction.

If so, the next question which arises is, whether the keeping up the sea defences of a town or borough is matter of general and public concern. It is said that the repair of a highway or a bridge is matter of public concern, because all the King's subjects *may* have occasion to use it. And why *may* not all the King's subjects have occasion to reside in, or to pass through, the town and borough of Lyme? It may be difficult to define precisely over what quantity of land, or to how large a district any benefit must be extended in order to render such benefit a matter of general and public concern; but surely no danger or inconvenience can arise from holding that it is sufficient if such benefit extend to a whole town or borough. But it is said that even if the repair of the sea defences of a town or borough be matter of general and public concern; yet that the declaration in this case does not shew that the particular "buildings, "banks, sea-shores, mounds, or ditches," alleged to be out of repair are part of the sea defences of the borough; nor is it expressly averred that the public had any interest in them. The answer is, that the buildings, banks, sea-shores, mounds, or ditches in question, are described in the declaration in the very words used in the charter as set out in the declaration, and are expressly averred to have been in existence at the time when the charter was granted and accepted; and it is also expressly averred that the corporation were liable under the charter to repair them. Now these words in the averments of the declaration must be

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understood in the same sense as the same words in the charter ; and as we are of opinion that the true construction of them in the charter is to understand them as limited to the sea defences of the borough, so we think, that they are to be taken to have the same meaning in the declaration, and to have the same effect as if the buildings, banks, sea-shores, mounds, or ditches in question were expressly averred to be part of the defences and safeguards of the borough and town against the encroachments of the sea.

And this opinion is further strengthened by the circumstance that the present objection arises after verdict. The effect of a verdict in curing defects in the pleadings of common law is stated correctly in one of the last cases on the subject, viz., that of *Jackson v. Pesked*.\* There Lord *Ellenborough* said : — “ Where a matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided that it contains terms sufficiently general to comprehend it in fair and reasonable intendment, will be cured by verdict ; and where a general allegation must, in fair construction, so far require to be restricted that no judge and no jury could have properly treated it in an unrestrained sense, it may reasonably be presumed after verdict that it was so restrained at the trial ; but unless the allegation is of such a nature that it would have been doing violence to the terms as applied to the subject-matter to

\* 1 M. &amp; S. 234.

“ have treated it as unrestrained, we are not aware  
 “ of any authority which will warrant us in pre-  
 “ suming that it was considered as restrained,  
 “ merely because in the extreme latitude of the  
 “ terms such a sense might be affixed to them.”  
 Here we think that the allegations of the declaration, as applied to the subject-matter, do by reasonable intendment shew that the buildings, banks, mounds, and ditches in question were part of the defences and safeguards of the town and borough against the encroachments of the sea, and particularly of that part of the town and borough in which the Plaintiff's property is situated. The declaration therefore shews a charter, casting an obligation on the corporation to do repairs of general and public concern, and avers that they have omitted to do such repairs, and that the Plaintiff has thereby sustained special damage.

It is not indeed shewn that the Plaintiff's house existed at the time when the charter was granted ; neither can this be necessary : for if the obligation to repair be of a public nature concerning the whole borough, the whole borough has a right to be protected ; and it is immaterial whether the inundation affects the lands or houses at any time erected on those lands.

It is, however, further urged, that whatever engagement the corporation may be under, as between them and the Crown, so as to render them liable either to a forfeiture of their charter or any other proceedings by the Crown, yet that no stranger can take advantage of such engagement and maintain an action. It is admitted that if their liability arose by prescription, they would be indictable ; and also an action would lie for special damage, as

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in the *Mayor &c. of Lynn v. Turner* \*, *Churchman v. Tunstall* †, *Payne v. Partrich* ‡, and many other authorities, which it is unnecessary to cite, because it is clear and undoubted law that, wherever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage. Now we are unable to see any sound distinction between a liability by prescription and a liability arising within time of memory, but legally created. We do not say that prescription necessarily implies a charter or grant, but it necessarily implies some legal origin, and charter would be a legal origin. Suppose that a prescriptive obligation were alleged, and that a charter granted before time of memory were produced, and so the legal origin were shewn, could that destroy the prescription? Certainly not. Would the obligation arising from that charter have been less binding within a few years after it was granted than it is now after a greater lapse of time? Certainly not. If therefore the origin be legal, how can it be important when it took place? We do not go the length of saying that a stranger can take advantage of an agreement between A and B, nor even of a charter granted by the King, where no matter of general and public concern is involved; but where that is the case, and the King, for the benefit of the public, has made a certain grant, imposing certain public duties, and that grant has been accepted, we are of opinion that the public may enforce the performance of those duties by indictment, and individuals peculiarly injured by action. If it were otherwise, many inconveniences would follow. Among them,

\* Cowp. 86.

† Hardr. 162.

‡ Show. 255.; Carth. 191



in the case in question, is this : that as the duty and the right to repair the sea defences of the town and borough is cast upon the corporation, no other person would be justified in interfering and doing repairs, however necessarily, or at all events not until the corporation had been called upon and neglected to do them ; *The Earl of Lonsdale v. Nelson* \* : and it is doubtful whether he would be justified even then, the proper remedy being as there stated, by indictment or action ; for nuisances of omission cannot in general be abated. Two of the judges have entertained considerable doubts whether the declaration contains sufficient words in this case to show that the mounds or banks were of such public benefit as that an indictment would lie for not repairing them ; but agreeing in the general view of the law, they, as well as the rest of the judges who heard the argument, are of opinion that the question proposed by your Lordships must be answered in the affirmative, and that the declaration is sufficient.

*The Lord Chancellor.*—The judgment of the Court below was supported by the unanimous opinion of the Court of Common Pleas and three of the judges of the King's Bench — the fourth judge giving no opinion. Those opinions are satisfactorily confirmed by that which has just been delivered. The doubt upon the matter of pleading which has been entertained by two of the learned judges, does not materially affect the main question. I, therefore, advise and move, that the judgment should be affirmed ; but without costs, because it is a question of some difficulty.

Lord *Wynford* concurred.

Judgment affirmed.

\* 2 B. & C. 302.

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## ENGLAND.

(COURT OF CHANCERY.)

JAMES STALEY - - - - *Appellant.*JOHN KING and THOMAS HINDLE *Respondents.*

By bill in equity, it was alleged that Kemp having made an agreement for the purchase of a house, &c. which was an advantageous bargain, he entered into an agreement with King the Defendant, to transfer to him the benefit of the agreement for a sum of 3000*l.*, and obtain for him a conveyance of the premises; thereupon a memorandum was drawn up in the following terms:— Mr. K. “when the title to the Plaintiff’s estate is perfected, and the same shall be regularly conveyed to me by all the parties, I will be accountable to you for the sum of 3000*l.* upon receiving a proper release from you and Mr. Wilson for the same. I am yours, John King, 15th of June, 1818.” That Kemp immediately afterwards borrowed 3000*l.* of B. upon this undertaking of King; and delivered an order to King to pay the money to B. The Defendant King, by his answer, represented that the contract was made with Wilson, who was an uncertificated bankrupt; but that the name of Kemp was used as a cover against his assignees, that he had obtained a conveyance and possession of the premises not through Kemp or Wilson; but by negotiation with the owners. There was no evidence on either side in support of or contradiction to these different statements of the transaction, except as appears by the terms of the agreement, and by a letter without date from Wilson to Kemp, in which he says, “It has always been known to you, that the money in King’s hands has always been the only tangible means I had to settle my affairs with you.” Upon this state of the pleadings and proof, the bill was dismissed, and upon appeal the decree was affirmed.

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ON the 24th of January, 1821, Thomas Bignold and Robert Kemp filed their original bill of complaint against the Respondent King who was the sole defendant. By that bill they stated that in the year 1818 Robert Kemp entered into an agreement for the purchase of certain lands and hereditaments situate in Philpot Lane in the city of London: that the price contracted to be paid for the same was a very low price, and the bargain was very advantageous to the purchaser: that shortly after the agreement for purchase had been entered into Robert Kemp contracted and agreed with the Respondent King to sell to him his Robert Kemp's equitable interest in the said lands and hereditaments at a premium of 3000*l*.: that it was stipulated between the Respondent King and Robert Kemp that he, Robert Kemp, should procure the conveyance of the said lands and hereditaments to be made to the Respondent King immediately from the vendors thereof, and that the Respondent King should, upon the conveyances being executed, pay to the vendors the sum agreed to be paid to them by Robert Kemp in part of the purchase-money and should pay to Robert Kemp the said further sum of 3000*l*. the consideration of the transfer of his, Robert Kemp's, equitable interest as aforesaid: that Robert Kemp being in immediate want of the sum of 3000*l*. and the investigation of the title and the preparing and settling of the conveyances of the lands and hereditaments being likely to occasion much delay in the payment of the 3000*l*. Robert Kemp requested the Respondent King to give him an undertaking in writing for the payment of the 3000*l*., in order that he might thereby

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be enabled to raise the sum of 3000*l.* immediately; that accordingly on the 15th of June, 1818, the Respondent King gave Robert Kemp an undertaking in writing which was in the words and figures or to the effect following; (that is to say,) “ Mr. Kemp, when the title to the Philpot Lane “ estate is perfected, and the same shall be “ regularly conveyed to me by all the parties, I “ will be accountable to you for the sum of 3000*l.* “ upon receiving a proper release from you and “ Mr. Wilson for the same. I am yours, John King. “ Monday, June 15th, 1818.” That after the written undertaking had been given, Robert Kemp applied to Thomas Bignold and requested him to advance to him, Robert Kemp, the sum of 3000*l.* upon an assignment or transfer to Thomas Bignold of the agreement so entered into with the Respondent King: that Thomas Bignold was at length induced to agree thereto: that accordingly a memorandum of the transfer of the interest of Robert Kemp in the said agreement and of the benefit of the undertaking was drawn up, and the same was sent to the Respondent King: that the said memorandum was in the words and figures or to the purport and effect following, that is to say, “ Esteemed friend King, be pleased to pay Thomas “ Bignold or his order, pursuant to thy letter to me “ dated the 15th instant” (meaning the aforesaid undertaking), “ the sum there mentioned, and his “ receipt shall be thy discharge. Thine, Robert “ Kemp. June 27th, 1818.” That, in pursuance of the said agreement, Thomas Bignold paid the sum of 3000*l.* to Robert Kemp in consideration of the transfer to him of the benefit of the agreement (with King): that some time after the said memorandum

was deposited with the Respondent King the title of the said lands and hereditaments was perfected : that Robert Kemp procured the conveyance of the lands and hereditaments to be made from the vendors thereof immediately to the Respondent King : that such conveyances were duly executed by the proper parties thereto : that the Respondent King was at the time of filing the original bill in the undisturbed possession and enjoyment of the lands and hereditaments : that Thomas Bignold and Robert Kemp had applied to the Respondent King and requested him upon the execution of a proper release for the same to pay to Thomas Bignold the sum of 3000*l*. and interest thereon, from the time of the executing of the conveyances, being the consideration-money for the said assignment or transfer of Robert Kemp's interest in the said premises. The bill also charged that the Respondent King had not paid any part of the sum of 3000*l*., or of the interest due thereon, and that Richard Wilson acted as agent of Robert Kemp in the making of the contract for the purchase of the said lands and hereditaments and had no interest in such contract. The prayer was, that an account might be taken by and under the direction of the Court of what was due for principal and interest on the undertaking and agreement of the Respondent King ; and that he might be decreed to pay to Thomas Bignold what should be found due on taking the aforesaid account upon a proper release being executed to him ; or that in default thereof a competent part of the said lands and hereditaments might be sold in order to raise what should be found due on taking the aforesaid account ; and that out of the produce of such sale

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Thomas Bignold might be paid what should be so found due and for general relief.

The Respondent King by his answer said he was informed and believed it to be true that Richard Wilson, who at the date of the transaction stated in the bill and at the time of filing the answer still was an uncertificated bankrupt, contracted for the purchase of the land and premises (the subject of the suit) for his own use and benefit at or for the price or sum of 10,500*l.*, and that such contract was reduced into writing and signed by Richard Wilson, who therein also undertook to pay some deposit in respect of his purchase within a certain period therein limited but failed so to do: that shortly afterwards Richard Wilson was introduced to the Respondent by Robert Kemp and represented by him, Robert Kemp, to be the *boná fide* purchaser of the said lands and hereditaments upon speculation, and that Richard Wilson was unable to complete his contract for the purchase of the said premises, and represented to this Respondent that the price contracted to be paid for the same was a very low price, and that the bargain was advantageous to the purchaser: that, influenced by the representations of Richard Wilson and Robert Kemp touching the value of the premises, the Respondent was induced to consent to give unto Richard Wilson a sum of 3000*l.* to relinquish the benefit of his contract for the purchase of the estate in favour of the Respondent, and to pay to Richard Wilson the sum of 3000*l.* over and above the price or sum contracted by Richard Wilson to be paid for the estate when and as soon as the title thereto should be approved and the conveyances thereof perfected: that

Richard Wilson immediately afterwards went with the Respondent to the house of Mr. Burton, and that he at the request of Richard Wilson consented to cancel the contract entered into between him and Richard Wilson for the purchase of the estate; and the same having been accordingly cancelled, a new contract and agreement in writing was drawn up and signed by and between Mr. Burton and the Respondent for the sale and conveyance of the estate at the same price which Richard Wilson was to have paid for the same. The Respondent by his answer admitted it to be true that after a very considerable lapse of time from the time of his first entering into the contract with Mr. Burton, Robert Kemp did request the Respondent to give him an undertaking in writing for the payment of the sum of 3000*l.* as in the bill mentioned for the better security, as this Respondent then understood, of Richard Wilson and to protect him by such payment to or in the name of Robert Kemp against any claims that might be set up by the assignees of Richard Wilson in respect of the monies to be paid to him by the Respondent under such agreement, for the transfer of his interest in the purchase: that he did on the 15th of June, 1818, give to Robert Kemp an undertaking in writing to the effect in the bill mentioned; and he was induced to give such conditional and qualified undertaking as evidence that he was to pay the 3000*l.* upon the purchase being completed, and that the name of Robert Kemp was made use of in such undertaking at the desire of Richard Wilson, who was then an uncertificated bankrupt, for the purpose of protecting him from any claims that might be set up

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by his assignees in respect of the said sum of 3000*l.*: and that the Respondent was still further induced to give such undertaking upon an agreement or mutual understanding between all parties, that the Respondent should, on the completion of the purchase, retain in his hands the sum of 500*l.* residue (part) of the sum which the Respondent had agreed to give to Richard Wilson, for the transfer of his interest in the first-mentioned contract for the purpose of liquidating certain claims which the Respondent then had, and, at the time of filing his answer, still had against Robert Kemp. The Respondent by his answer admitted that some memorandum of an intended transfer of the interest of Robert Kemp (and who was considered by the Respondent as a mere trustee for Richard Wilson) in the said agreement with the Respondent was drawn up by Robert Kemp and sent to the Respondent; but this Respondent saith that he had since lost or otherwise mislaid the same, and that he was therefore unable, as to his belief or otherwise, to answer whether the said memorandum was in the words or figures, or to the effect in the bill stated: that some time after the said memorandum was sent to the Respondent the title of the lands and hereditaments was perfected; and that such conveyances as in the bill mentioned had been duly executed by the proper parties thereto: that the Respondent was, at the time of filing his answer, in the undisturbed possession or enjoyment of the said lands and hereditaments; and that the said sum of 3000*l.* had not as yet been paid to Thomas Bignold and Robert Kemp, or either of them, by the Respondent. The Respondent by his answer denied the principal allegations of the



bill, and insisted that to whomsoever the said sum of money of right belonged yet the Respondent ought in nowise to be charged or chargeable with any interest whatsoever in respect thereof, the same having been agreed to be paid by the Respondent as a mere *bonus*, or premium, and without any interest or further advantage thereon. He also denied, to the best of his belief, that Richard Wilson did act as the agent of and for Robert Kemp in the making of the first-mentioned contract for the purchase of the aforesaid lands and hereditaments; for he said that when Richard Wilson was introduced to the Respondent by Robert Kemp, for the purpose of purchasing Richard Wilson's interest in the contract for the purchase of the premises, he was led to understand and believe that Richard Wilson was alone interested in the contract, and that he had entered into the same upon speculation for his own sole use and benefit.

No further steps were taken in the suit till the 23d of January, 1828, when the Appellant James Staley, as sole surviving assignee of the estate and effects of the said Thomas Bignold, filed his bill of complaint against the Respondent King and Thomas Hindle and Henry Dance; and therein, after stating the fact of the filing of the first-mentioned bill, and setting forth the prayer of it, he alleged, by way of supplement, that a commission of bankrupt, bearing date the 2d of October, 1823, was awarded and issued against Thomas Bignold, under which he was found and declared a bankrupt: that the Appellant James Staley and Evan Roberts were afterwards chosen and appointed assignees of the estate and effects of Thomas Bignold; and thereupon such estate and effects were

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duly conveyed and assigned to the Appellants James Staley and Evan Roberts, their heirs, executors, administrators, and assigns: that Evan Roberts had departed this life; and that, by the means aforesaid, the right and interest of Thomas Bignold in the suit were vested in the Appellant: that Thomas Kemp having been arrested and imprisoned for debt in the month of February, 1821, as an insolvent debtor, took the benefit of the acts of parliament then in force for the relief of insolvent debtors in England, and was discharged from imprisonment by such means; and thereupon by an indenture, bearing date the 18th of February, 1821, executed by Robert Kemp, all the estate and effects of Robert Kemp were conveyed and assigned to Henry Dance in trust for the usual purposes: that Robert Kemp had since died insolvent: that there was not then, nor ever was, any personal representative of Robert Kemp: that previously to the year 1818 a commission of bankrupt, bearing date the 11th of April, 1816, was awarded and issued against Richard Wilson in the original bill named, under which he was found and declared a bankrupt: that Robert Bradbury and Thomas Hindle were afterwards, and before the year 1818, chosen and appointed assignees of the estate and effects of Richard Wilson: and thereupon, and before the year 1818, such estate and effects were conveyed and assigned to the said Robert Bradbury and Thomas Hindle, their heirs, executors, administrators, and assigns: that Robert Bradbury was dead: that Richard Wilson did not, in or before the year 1818, obtain his certificate under the last-mentioned commission, and was in and throughout the years 1817, 1818, 1819, and 1820, an uncertificated

bankrupt. The prayer of the supplemental bill was that the suit might stand and be revived, and that the Appellant might be at liberty to prosecute the same, and might have the benefit thereof and the proceedings therein against the Respondent King, and Thomas Hindle and Henry Dance respectively.

On the 24th of April, 1828, the Appellant obtained an order for liberty to amend his bill of supplement. In the amendments he repeated, by way of recital, most of the allegations contained in the original bill of Thomas Bignold and Robert Kemp, and charged that the amended bill of supplement was filed with the consent and authority of the creditors, who had proved debts under the commission against Thomas Bignold. There were also introduced into the amended bill various charges putting in issue the facts alleged, that Robert Kemp had alone been the original purchaser of the premises in Philpot Lane, and that Kemp was the person with whom the Respondent King had contracted.

The Respondent King, by his answer to the amended bill of supplement, admitted (as to belief) the supplemental facts alleged; but he said that he did not believe that Richard Wilson, as the agent and on behalf of Robert Kemp, entered into the original agreement for purchase, but that such agreement was entered into by Richard Wilson on his own account. And he denied that there was any contract between him and Robert Kemp for the sale to the Respondent of Robert Kemp's equitable interest in the amended bill mentioned; or that the contract was made and entered into by Robert Kemp personally on his part; or that it was made

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and entered into by Richard Wilson as agent for Robert Kemp; or that every thing in the bill mentioned was transacted or done by Robert Kemp which was not transacted or done by Richard Wilson, as the agent and on the behalf of Robert Kemp: that he did not believe that Thomas Bignold paid to Robert Kemp the sum of 3000*l.* in the bill mentioned; and he submitted whether the matters in respect of which relief was sought by the original bill, and the original and amended bills of supplement, were proper for a court of equity.

Thomas Hindle, as assignee of R. Wilson, by his answer, claimed such right and interest (if any) in the matters in question in the suit as R. Wilson might have had at the date of his bankruptcy; but he said he did not know that R. Wilson if he had not been a bankrupt would have had any such right or interest.

On the 13th of July, 1829, the Appellant obtained an order for leave to amend both the original bill and the amended supplemental bill. By the amendments in the original bill he alleged that after the written undertaking had been given, Robert Kemp applied to Thomas Bignold and requested him to advance to him, Kemp, the sum of 3000*l.* upon an assignment or transfer to Thomas Bignold of the agreement so entered into with the Respondent: that Thomas Bignold was at length induced to agree thereto, upon condition that he should not have to wait above three months for the fulfilment of the Respondent's underaking: that the undertaking, bearing date the 15th of June, 1818, was by Robert Kemp put into the hands of Thomas Bignold: that after Thomas Bignold had paid the sum of 3000*l.* to Robert Kemp and in consequence

of difficulties made by the Respondent, which occasioned more than three months' delay to take place in the completion and performance of his undertaking, it was arranged and agreed by and between Thomas Bignold and Robert Kemp and Richard Wilson, that the sum of 3000*l.* paid by Thomas Bignold should be returned to him, but that Thomas Bignold, who was then a creditor to a considerable amount of Robert Kemp and of Richard Wilson, should from time to time make further advances to them or one of them, and should hold the undertaking, signed by the Respondent, and the benefit thereof by way of a security to him, as well for the payment of the sums then due to him from Robert Kemp and Richard Wilson respectively, and interest thereon, as also for the payment to Thomas Bignold of all such sums as he should thereafter advance or pay to or for the use or on the account of Robert Kemp and Richard Wilson, or either of them, and interest thereon: that Thomas Bignold did accordingly, in consequence and on the faith of such arrangement and agreement, and also of the Respondent's undertaking, make further advances to a considerable amount to Robert Kemp and Richard Wilson respectively, before the year 1821; and that there remained and was justly due to Thomas Bignold from Robert Kemp and Richard Wilson respectively, by the means and on the accounts aforesaid, a sum exceeding 5000*l.*; and that it was arranged and agreed by and between Thomas Bignold and Robert Kemp that Thomas Bignold should take to and have the undertaking, signed by the Respondent, and all the benefit thereof to and for Thomas Bignold's own use, in satisfaction, however, and discharge of all right of personal de-

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mand, by way of action, against Robert Kemp for the amount so due from him to Thomas Bignold; and he further charged that such contract (meaning the original contract for the purchase of the said lands and hereditaments) was in writing, and duly signed by the vendors, or their agent, for that purpose: that if the said agreement between Robert Kemp and the Respondent for the sale to him of Robert Kemp's equitable interest aforesaid was not made and entered into by Kemp personally on his part, it was made and entered into on his part by Richard Wilson as agent for Robert Kemp, and that every thing therein before mentioned to have been transacted or done by Robert Kemp which was not done or transacted by him personally, was transacted or done by Richard Wilson as the agent and on behalf of Robert Kemp.

Under the same order the Appellant again amended his supplemental bill. In this re-amended supplemental bill the Appellant described himself as sole surviving assignee of the estate and effects of Thomas Bignold a bankrupt, and administrator of the personal estate and effects of Robert Kemp, deceased; and in reciting the bill filed in the names of Thomas Bignold and Robert Kemp, he set forth the statements of it as they were set forth in the amended bill, though no mention of the amendments of the original bill was made in the re-amended supplemental bill. He also struck out the allegations relating to Robert Kemp's having taken the benefit of the Insolvent Act, and the assignment of his effects to Henry Dance were struck out; and it was alleged that Robert Kemp since February, 1821, had died intestate, and that since his death letters of administra-

tion of his goods, chattels, and credits had been granted to him, the Appellant, by and out of the proper Ecclesiastical Court; and that he had thereby become and was at the date of the re-amendment of the supplemental bill the legal personal representative of Robert Kemp. The prayer of the re-amended supplemental bill was that the suit might be revived, and that the Appellant might be at liberty to prosecute the same, and have the benefit thereof, and of the proceedings therein, and of the facts in the re-amended supplemental bill stated by way of supplement against the Respondent King and Thomas Hindle respectively; and that it might be declared that no release from Richard Wilson or Thomas Hindle to the Respondent King was necessary, or that Thomas Hindle might be ordered to execute such release; and that a receiver of the rents and profits of the said lands and hereditaments might be appointed; and the name of Henry Dance as a defendant was struck out.

A subpoena, requiring the Respondent King to answer, was prayed; he was never called upon for any answer to the amended original bill or the re-amended supplemental bill. He had no notice of the amendments being made, and his office copies of the original bill and of the amended supplemental bill were not amended.

In this state of the pleadings the Appellant filed a replication to the Respondent's answer. The cause was heard before the Vice-Chancellor on the 1st of July, 1831.

At the hearing the Appellant read certain passages of the Respondent King's answer to the original bill which related to the statements therein contained with respect to the matters in

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dispute; he proved also certain exhibits relating to money transactions between Kemp, Wilson, and Bignold. Two letters from Richard Wilson to Robert Kemp were also proved as exhibits, in one of which the following passage occurs: — “It has always been known to you that the money in King’s hands has always been the only tangible means I had to settle my affairs with you.” In a postscript to the other letter he says, “I was glad to hear, the other day, that you had got possession of 3500*l.* from King. I hope this is correct.” It was also proved by the deposition of a banker’s clerk, that in June, 1818, a sum of 3000*l.* had been carried in the books of the bank from the account of Thomas Bignold, by virtue of his check, to the credit of an account then commenced with them by Robert Kemp. It then appeared also that the only title of the Appellant to sue as personal representative of Robert Kemp, was under letters of administration sworn under 20*l.*

By the decree it was ordered that the Plaintiff’s bill should stand dismissed out of the Court with costs.

The Appellant presented to the Lord Chancellor his petition of appeal against this decree of the Vice-Chancellor, insisting that his bill ought not to have been dismissed, but that he ought to have been declared to be entitled to the relief sought by the original and supplemental bills against the Respondent and Thomas Hindle, and praying that the decree of the Vice-Chancellor might be reversed.

This petition of appeal was heard before the Lord Chancellor on the 3d and 5th days of De-



ember, 1831, and was ordered to stand for judgment; on the 21st of January, 1832, his Lordship pronounced an order dismissing the petition of appeal with costs.

James Staley appealed to the House of Lords against the decree of the Vice-Chancellor and the order of the Lord Chancellor.

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For the Appellant, Mr. *Knight* and Mr. *G. Richards*.

The Defendant, John King, having signed the memorandum dated the 15th of June, 1818, was bound to pay the sum of 3000*l.* and the interest accrued due thereon, to Robert Kemp, or to his assignee or personal representative, and had no ground afterwards to dispute the right of Robert Kemp, or of his assignee, or of his personal representative, to receive the money which he had agreed to pay. Even if the Defendant, John King, had a right, as he insisted, to dispute the title of the Plaintiff, Robert Kemp, yet the right of suing on the undertaking, being vested in Robert Kemp, and the undertaking having been lodged with Thomas Bignold, as a security for advances to be made to Robert Kemp and Richard Wilson, or either of them; and Richard Wilson having also agreed to the undertaking being lodged as a security for advances to him from Thomas Bignold, the Appellant (as the Defendant, Thomas Hindle, did not oppose the payment) was entitled to a decree against the Defendant, John King, to pay the principal money and interest due on the undertaking.

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For the Respondent, Hindle, Mr. *Pemberton*

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and Mr. *Purvis* claimed the money in dispute for Hindle, as assignee of R. Wilson.

For the Respondent, King, the *Solicitor-General* and Mr. *J. Russell*.

The Appellant has not established any of the material allegations on which his claim is founded; and the case stated by him, whether taken as it appears on the original bill, or on the amended bill, is fictitious and altogether contrary to the truth. The Appellant pretends that Kemp had some equitable interest in the premises in Philpot-lane; and that this Respondent agreed with Kemp to give him 3000*l.* for that equitable interest. On these two allegations his suit proceeds, but they are both false: Kemp never had any interest, legal or equitable, in the premises in Philpot-lane; the Respondent, King, never purchased of him, nor agreed to purchase of him, any interest in these premises; neither Kemp nor Bignold had at any time such an interest in the matters of this suit as entitled them to sue the Respondent, King.

No consideration moved directly or indirectly from either Kemp or Bignold for the undertaking of the 15th of June, 1818, and neither of them had any interest in the undertaking or in the sum mentioned in it; but even if Kemp had had any valid claim against the Respondent, King, upon that undertaking, such claim was the proper subject of an action at law, and was not a matter of equitable jurisdiction. Even if Kemp had been entitled to the relief sought by him, the Appellant, who affects to represent Kemp only by virtue of letters of administration sworn under 20*l.*, has no right to that relief: and the Appellant, even if

he were constituted sufficiently for the purposes of this suit personal representative of Kemp, is not entitled to any relief in that character, because his claim in the character of such personal representative has been introduced into the record irregularly and improperly; neither is he entitled to sue as assignee of Bignold, because he has not shewn that the supplemental bill was filed and the suit prosecuted with such consent of Bignold's creditors as is required by the bankrupt laws.

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The *Lord Chancellor*.—This is an appeal from a 12th Aug. judgment originally of the Vice-Chancellor, which was affirmed by me in the Court of Chancery. When the case was argued in this house upon the appeal, it appeared to me that there was some difficulty, which induced me to advise the House to adjourn the decision, that I might have time to consider the question. The doubt in my mind arose principally from the circumstance, that the contract was made by the Respondent, King, nominally with a person of the name of Kemp, whose rights and interests are claimed by the Appellant. To a certain degree the difficulty and the doubt upon this point is cleared away, since it appears that the name of Kemp was used as a cover to the transaction, which in effect was a contract between King and Wilson, an uncertificated bankrupt. Upon that ground I am satisfied that the judgment of the Court below is right, and therefore I move that the judgment should be affirmed, and with costs.

Judgment affirmed.

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## ENGLAND.

(COURT OF CHANCERY.)

|                                 |                      |
|---------------------------------|----------------------|
| CHARLES NEWDIGATE NEWDEGATE,    | } <i>Appellants.</i> |
| CHARLES NEWDEGATE, an Infant    |                      |
| by the said C. N. NEWDEGATE,    |                      |
| his Father and next Friend, and |                      |
| EDWARD MILLER MUNDY - -         |                      |

FRANCIS NEWDIGATE - - - *Respondent.*

R. N. by his will devised to F. N. and his assigns for his life, all his real estates in W., without impeachment of waste, *except the timber growing in the park avenues, demesne lands, and woods adjoining to the capital messuage called Arbury*; remainder in trust for C. N. N. for life, remainder to his first and other sons in tail male. Held, that the restriction as to cutting timber was confined to the premises specified in the exception clause, and ought not to extend to the woods adjoining to the excepted parts, nor to the avenues made by the testator in those woods; and that no proceeding for equitable waste could be maintained as to trees planted, &c., for ornament, &c., as to a house which had formerly been a principal mansion, and having gone to decay had been restored by F. N., the tenant for life.

Held also that the Plaintiff, having made a case by his bill for an inquiry and account as to equitable waste, and having had the opportunity of supporting that case by evidence, which he had omitted to do, was not entitled to an issue as to that equity, nor to raise the question anew in a supplemental or other suit, although the bill as to that equity had not been dismissed by the decree.

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THE Appellants, on the 26th of June, 1824, exhibited their original bill of complaint in the High Court of Chancery, against the Respondent,

stating, amongst other things, that Sir Roger Newdigate, late of Arbury, otherwise Erdbury, in the county of Warwick, Baronet, was at the time of making his will, and thenceforth until his death, seised of or otherwise entitled in fee simple, in possession, of or to the real estates therein and herein-after mentioned, and of or to divers other lands, tenements, and hereditaments, and being of sound and disposing mind, memory, and understanding, duly made and published his last will and testament in writing, bearing date the 30th day of October, 1800, and which was executed and attested in such manner and form as by law is required for devising real estates, whereby he, amongst other things, gave to the Respondent all such stock in the 3 $\frac{1}{2}$  per cent. reduced bank annuities, or other bank stock, and all his shares in the several canal stocks therein stated, and turnpike or other securities, of which he should die possessed, upon trust to sell and dispose of the same respectively, and apply the produce thereof in discharge of his debts, by mortgage, bond, or specialty, and also in discharge of his debts by simple contract, funeral expenses, and legacies, given by any codicil or codicils; and he gave to the Respondent, for his absolute use and benefit, subject to his debts as aforesaid, all the rest of his personal estate, whatsoever and wheresoever. The testator also gave to the Respondent and his assigns for his life, subject to the payment of his debts, by specialty or simple contract, and legacies, and also to the annuities given by any codicil or codicils, all and singular his real estates, manors, freehold lands, and freehold estates, in the county of Warwick or elsewhere, except his real

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estates, manors, and freehold or other estates in the county of Middlesex, and to his assigns for his life, without impeachment of waste, *except the timber growing in the park avenues, demesne lands, and woods adjoining to the capital messuage called Arbury*, in the said county of Warwick; and from and after the death of the said Respondent, the said testator gave all and singular the said real estates, manors, and lands in the said county of Warwick, or elsewhere, whatsoever and wheresoever, whereof he should be possessed at the time of his death, together with certain other estates therein mentioned, unto and to the use of Sir John Mordaunt, Baronet, and Edward Miller Mundy, therein named, and their heirs during the life of the Appellant Charles Newdigate Newdegate, by his then name of Charles Newdigate Parker, without impeachment of waste, but nevertheless upon trust for the Appellant Charles Newdigate Newdegate and his assigns, with remainder to the first and other sons of the Appellant Charles Newdigate Newdegate, successively, in tail male, with remainder, including his equitable remainder in fee of rent charges therein mentioned, expectant on the failure of issue male of the Appellant Charles Newdigate Newdegate, to Francis Newdigate, son of the Respondent, and his assigns for his life, without impeachment of waste, with remainder to the said trustees and their heirs during his life, to preserve contingent remainders, with remainder to the first and other sons of the said Francis Newdigate the son, successively, in tail male, with divers remainders over; and the said testator further willed and directed, that the Appellant Charles Newdigate Newdegate, then called Charles Newdigate Parker, should, from and

immediately after his decease, take upon him and use the arms and surname of "Newdegate," as the same was anciently written, as well as all the persons to whom any use or estate of inheritance or freehold, in his said real estates was thereby limited after his decease, under the condition and penalty therein in that behalf mentioned; and the said testator thereby empowered the tenants for life in remainder, as they should come into possession, to settle any part thereof, to the value of 600*l.*, by way of jointure, and directed that as the tenants for life should be in the actual possession of the said estates, by virtue of his said will, they should have power to let leases for any term not exceeding twenty-one years, at the best rent, without taking any fine of any part thereof, except the mansion, park, and demesne lands of Arbury.

The bill further stated, that the testator made several codicils to the will, by one of which, bearing date the 15th of April, 1806, he gave certain directions relative to a certain rent charge in the said will; that by the other codicils thereto, he did not either alter or revoke his will or codicil of the 15th of April, 1806; and that the testator died on the 6th day of November, 1806, without having revoked his will, save so far as the same was revoked or altered by the codicil of the 15th of April, 1806, or other codicils; and that in pursuance of the conditions contained in the testator's will, the Appellant Charles Newdigate Newdegate procured an act of parliament to be passed in the fifty-fifth year of the reign of his late majesty King George the Third, intituled "An act for enabling " Charles Newdigate Parker, calling himself Charles " Newdigate Newdegate, to take the name and

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“arms of ‘Newdegate,’ and also for extinguishing  
“a certain rent-charge (subject to a life estate  
“part thereof), pursuant to certain conditions con-  
“tained in the will and codicil of Sir Roger New-  
“digate, Baronet, deceased,” to the purport and  
effect in the said bill mentioned and set forth.

The bill further stated, that, upon the decease of the Respondent, the Appellant Charles Newdigate Newdegate would, under the limitations contained in the will, be tenant for life in possession, without impeachment of waste, of all the estates and premises in the county of Warwick, and entitled to cut down timber for his own use and profit, as well in the park avenues, demesne lands, and woods adjoining to the capital messuage called Arbury, as in other parts of the estates and premises; and that the Appellant Charles Newdegate was the eldest son and heir male apparent of the body of the Appellant Charles Newdigate Newdegate, and as such, upon the decease of the Respondent and the Appellant Charles Newdigate Newdegate, would be, under the limitations of the will, tenant in tail male of the estates and premises; and that Edward Miller Mundy, the surviving trustee named in the will, had died, leaving the Appellant Edward Miller Mundy, his eldest son and heir at law, him surviving.

The bill further stated, that the estates in the county of Warwick so devised to the Respondent for life as aforesaid, consisted of a mansion-house called Arbury, and of a mansion-house called Astley Castle, and 5650 acres of land thereunto adjoining, whereof the park belonging to the mansion-house called Arbury contained about 300 acres of land; and that the lands which were held in hand by the testator at the time of his death,



together with the park and woods, also in hand, consisted of 800 acres or thereabouts, and were part of the demesne lands belonging to the capital mansion house called Arbury; and that there were several woods on the estate and premises belonging to the capital mansion-house called Arbury, which lay intermixed with or adjoining to the demesne lands, two of which woods were called North Wood or Spring Kidden Wood, and Seas Wood; and that through the wood called North Wood or Spring Kidden Wood, there was an avenue which communicated with the North Lodge, opening on the high road leading from Nuneaton to Astley, and that the said avenue formed the only communication from the said mansion-house, through the North Lodge as aforesaid, to the high road; and that the woods called North Wood or Spring Kidden Wood and Seas Wood were part of the demesne lands belonging to the mansion house called Arbury: and that there was another wood, called Hawkes Wood, and also a small wood adjoining thereto, abutting to the south-west of the said capital mansion-house, and adjoining to the park; and that there was an avenue leading through the two last mentioned woods, which communicated on one side with the road leading to the mansion called Arbury, and on the other side with the mansion-house called Astley Castle; and that at the end of the avenue nearest to Astley Castle was a lodge-gate, called Astley Lodge Gate, and that the said avenue was always used by the testator in his lifetime, and was the only road or way from the said capital mansion-house called Arbury to the mansion-house called Astley Castle; and that there were certain farms, part of the demesne lands adjoining or belonging to the capital mansion-house called

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Arbury, called Dencher's or Horner's Farm, and Temple House Farm; and that the Respondent, who entered into the possession and receipt of the rents and profits of the estates and premises upon the death of the testator, had, since he had been in such possession, cut down or felled, or caused to be cut down or felled, divers timber trees of oak, ash, elm, and other kinds, which were standing, growing, and being in the park avenues, demesne lands, and woods adjoining to the capital messuage called Arbury, and the gardens and pleasure grounds thereto belonging; and in particular that he had cut timber in the wood called Seas Wood, to the value of 8000*l.* and upwards; and in the wood called Spring Kidden Wood, and in the private towing path adjoining, to the value of 400*l.* or thereabouts, and converted the profits thereof to his own use, and that Seas Wood was separated from Spring Kidden Wood only by a private canal, made by the testator in his lifetime, which communicated with Seas Pool, and from thence conducted the water to the capital mansion house called Arbury.

The bill further stated that the Respondent had, within the last three months, cut down and felled or grubbed up, all the timber and other trees which were standing, growing, and being in the wood called Hawkes Wood, which lay on each side of, and was divided by an avenue leading from the said mansion-house called Arbury, to the other mansion-house called Astley Castle; and also in the small wood adjoining to Hawkes Wood, which timber so cut was of the value of 2000*l.* and upwards; and that there was lying in the said woods a great quantity of timber so cut and felled as

aforesaid; and that the Respondent having already sold the bark thereof, was about to sell the timber and convert the profits thereof to his own use.

The bill further stated that the Respondent had also in like manner felled and cut down divers oak, ash, elm, and other trees in the park, belonging to the mansion-house called Arbury, and in the gardens and pleasure grounds adjoining thereto, and in particular a great number of trees which stood in the south avenue in the said park, and removed the same and appropriated them to his own use; and likewise a great number of trees in a certain farm called Dencher's or Horner's Farm, formerly in the occupation of the testator Sir Roger Newdigate, part of which had been sold; but that the remainder was then lying on the ground, and the Respondent had also cut down divers oak, ash, and other trees in the farm called Temple House Farm, adjoining to the said park, which was sold to Isaac Swinnerton therein named; and that the said Respondent had also sold to the said Isaac Swinnerton a large quantity of timber, felled from different parts of the said estates and premises, expressed to be excepted as aforesaid.

The said bill further stated, that the Respondent had cut down, or caused to be cut down, divers timber and other trees on every part of the said estates and premises belonging to the capital mansion-house called Arbury, many of which were or were intended to be ornamental, and afforded shelter to the said mansion-house and farm houses and buildings, or to the gardens and pleasure grounds thereto belonging; and also that the Respondent had cut down or felled divers timber and other trees which were standing, growing, and

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being near Astley Castle, and which were or were intended to be ornamental to the said mansion house called Astley Castle, and the buildings thereto adjoining, and the gardens and pleasure grounds thereto belonging, by means whereof the Respondent had greatly damaged and injured the inheritance of the estate and premises. And the Appellants thereby insisted that the Respondent ought to account for the timber and other trees so cut down and felled as aforesaid, and be restrained from selling the timber then lying on the ground, and also from cutting down any other trees which were then growing, and intended for ornament and shelter to the capital messuage called Arbury, or to the mansion called Astley Castle, or the grounds, lawns, or pleasure grounds thereto belonging.

The bill charged that the Respondent ought to set forth a full and true account of the timber trees cut down and felled by him, or by his order, upon the several parts of the estate; and also a true account of the timber and other trees which were or were intended to be ornamental to either of the mansion houses called Arbury and Astley Castle, or to the parks, pleasure grounds, and buildings thereto belonging, or which afforded shelter to either of the said mansions, or to any of the farm houses and other buildings on the estates devised by the testator.

The bill further charged, that all the said parts of the devised estates therein-before mentioned to be excepted, were by the testator's will expressly excepted from being cut by the Respondent during his life; and that the timber which the Respondent had cut or caused to be cut down from the parts aforesaid, was timber growing in the park

avenues, demesne lands, and woods adjoining to the capital messuage called Arbury; and that the Respondent intended or threatened to cut down, or cause to be cut down, other timber growing and being on the excepted parts of the said estates and premises; and also other timber and other trees which were ornamental to the said mansion-house, or to the park, gardens, pleasure grounds, and buildings thereto belonging; and also trees such as afforded shelter and protection to the house and buildings thereon, and to commit other waste and spoil and destruction thereon.

The bill prayed, that an account might be taken by and under the direction and decree of the Court, of all and singular the trees which had been so cut down and felled by the order, and with the permission of Respondent, and of the monies which had been received by him, or by any person by his order, or for his use, from the sale thereof; and that the Respondent might be decreed to answer the amount of such monies, the Appellant thereby waiving all pains and penalties incurred by the Respondent for committing waste on the said estates and premises; and that such timber as had been cut, and still remained in about the said park avenues, demesne lands, and woods adjoining to the said messuage called Arbury, might be sold by the direction and decree of the Court, and that the amount of such monies as aforesaid, together with the amount of the monies to arise from and by such sale as last aforesaid, might be secured and invested by and under the like direction and decree for the benefit of the persons entitled to the said estates under the said will of the testator Sir Roger Newdigate; and that the Respondent, his servants, agents, and

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workmen, might be restrained by the order and injunction of the said Court from cutting down timber trees growing in and upon the park avenues, demesne lands, and woods adjoining to the capital messuage called Arbury, and from cutting down timber and other trees growing upon the said estate and premises in the county of Warwick, which had been planted or growing thereon for the protection or shelter of the mansion-houses called Arbury and Astley Castle, or either of them, or for the ornament of the said mansion-houses and estates, or either of them, and which grew or stood in lines, walks, avenues, clumps, or otherwise, for the ornament of the said mansion-houses or either of them, or of the gardens, pleasure grounds, or buildings thereunto belonging, and from selling or removing, or causing to be sold or removed any of the trees which had been felled as aforesaid, and then remained on any part of the premises, and which had not then been sold or disposed of.

The Appellants, after the filing of the bill, obtained an injunction to the effect in the bill prayed.

The Respondent, by his answer, after admitting the will and codicils, the death of the testator Sir Roger Newdigate, and otherwise to the effect in the bill set forth, and also that the Respondent on his the testator's death entered into, and was still in the possession and receipt of, the rents and profits of the estates and premises devised to him for life, stated that the estates consisted of a mansion-house called Arbury, and about 5364 acres of land, and that the park called Arbury contained about 300 acres of land, and was divided from the mansion-house by pools of water and pleasure grounds; and that the demesne

lands were well known by the name of demesne lands, and situate within the manor of Arbury and hamlet of Griffé, and described in a certain map indorsed in the handwriting of the testator "Arbury demesne park and manor, and Griffé," and that the same contained in the whole 900 acres or thereabouts, consisting of the particulars in the answer set forth, whereof 623 acres, one rood, and nine perches were, with other lands, making altogether 794 acres, one rood, five perches, held by the testator in hand up to the time of his death; but that no part of the woods in the bill mentioned (save Spring Kidden Wood, containing thirty-six acres, Park Wood, eighteen acres two roods, and the wood called Scug Grove, containing two acres or thereabouts), were part of the demesne lands belonging to the capital mansion-house called Arbury; nevertheless, the Respondent admitted, that all the woods in the bill mentioned in that behalf, except Seas Wood, containing nineteen acres, two roods, and thirty-two perches were held in hand by the testator; but that Seas Wood did not form any part of the demesne lands, or lie intermixed therewith or adjoining thereto, and was distant at least 350 yards from Spring Kidden Wood, and separated therefrom by several closes and meadows through which an old water course formerly ran, which was converted into a private canal by the testator, and in part by the canal, and a strip of land on each side thereof, and a wood called the Alders; and that the canal conducted the water to a pool near to the mansion-house, but not to the mansion house called Arbury.

The Respondent further stated, that through Spring Kidden Wood, erroneously called North

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Wood in the bill, there was an avenue communicating on one side with North Meadow, and on the other opening on the high road leading from Nuneaton to Astley; but that there was no avenue through Great Hawkes Wood and Little Hawkes Wood, which are nearly a mile from the mansion house called Arbury, and 500 yards from the park, communicating with Astley Castle, inasmuch as although the testator made a road from the said park, through the said two woods, to the gate at the lodge, called Astley Lodge, the said road was divided from the fields on either side by quickset hedges, in which in many places were only a few young trees here and there, of different sorts and ages, which appeared to have grown up spontaneously in the hedges, and for the most part since the death of the testator, except on a slip of land on one side of the road, which was planted by the testator, and called the Ash Plantation, and has been cut regularly as underwood.

The Respondent further stated, that there was a farm called Temple House Farm, part of the said estates; but that no part of the said farm, except a certain close land and homestead therein mentioned, or any other farm and lands save as therein set forth, formed any part of the demesne lands adjoining or belonging to the mansion-house called Arbury.

The Respondent set forth, in the first schedule annexed to his answer, an account of such timber trees, of oak, ash, elm, and other trees, standing and growing in the park avenues, demesne lands, and woods adjoining to the capital mansion-house called Arbury, or in the gardens and pleasure grounds thereunto belonging, or which were stand-



ing or growing on any part of the estate devised to the Respondent, and intended for ornament or shelter, which had been felled by the order or for the use of the Respondent, and for which the Respondent submitted to account, both in respect of the money which had been or might be received on account of such timber trees, and for the value of all such parts as had been applied in repairs or otherwise: the Respondent, however, stated that such trees were cut either for the purpose of repairs, or because they were past their maturity, and detrimental to the tenants occupying the lands, without recollecting that the demesne lands were part of the lands upon which he was restricted from cutting timber.

In the second schedule annexed to his answer, he set forth a like account of such timber trees of oak, ash, elm, and other trees, which were standing and growing in the park avenues, demesne lands, and woods adjoining to the capital messuage called Arbury, or the gardens and pleasure grounds thereto belonging, or which were standing or growing on any part of the said estates, and intended for ornament and shelter, and had been cut by the order and for the use of the Respondent; and the Respondent submitted to the judgment of the Court whether, under the circumstances in the said schedule mentioned, the Respondent was not entitled to the same and to the produce thereof.

In the third schedule annexed to his answer, the Respondent set forth a like account of all such timber trees of oak, ash, elm, and other trees, which were standing or growing in or upon any part of the said estates, other than the park avenues, demesne lands, and woods adjoining to

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the said mansion-house called Arbury, which had, since the time therein mentioned, been cut down and felled, by the order or for the use of the Respondent; and the Respondent, by his answer, insisted and submitted that he was, under the will of the testator, entitled to cut down and fell the same, and to receive and convert the profits thereof to his own use, for that the said trees were not, nor were any of them, growing in or upon the park avenues, demesne lands, and woods adjoining to the mansion-house called Arbury, or any part or parts thereof, and ought not to come to any account respecting the same, or the produce thereof.

The Respondent further stated, that as for such trees as were growing, or intended for ornament and shelter to the capital messuage called Arbury, and the gardens and pleasure grounds thereto belonging, there were no such trees, save and except in the park avenues, demesne lands, and woods adjoining to the capital messuage called Arbury. And he denied that, save as in the third schedule mentioned, he had cut or caused to be cut any timber or other trees which were standing, growing, and being in Seas Wood, or in Great Hawkeswood and Little Hawkeswood; and the Respondent insisted and submitted that he ought not to be restrained by the injunction of the Court from cutting or causing to be cut or felled any timber or other trees growing near the house called Astley Castle, inasmuch as he was entitled to cut timber upon any parts of the said estates, except upon such parts thereof as the testator had expressly excepted; that is to say, the park avenues, demesne lands, and woods adjoining to the mansion-house called Arbury, no part whereof is near Astley Castle;

and for that the house called Astley Castle never was, as the Respondent had heard and believed, previous to or during the life of the testator, considered as a mansion-house upon the said estate; and the Respondent submitted that he ought not to be restrained by the injunction of the Court from selling and disposing of the timber which had been cut, and was then lying upon such part of the said estates which were not expressly excepted by the testator. And the Respondent denied that he threatened or intended to cut or fell, or cause to be cut or felled, any other timber trees growing on the excepted parts of the premises, or any other timber or other trees which were ornamental to the mansion-house, or the house described in the bill as the mansion-house called Astley Castle, or to the park, gardens, and pleasure grounds thereto belonging, or any trees which afforded shelter or protection to the buildings thereon, or to commit any waste or destruction thereon.

Witnesses were examined as to the situation of the woods, avenues, &c. with respect to the mansions.

The cause was heard before Sir John Leach, then Vice-Chancellor of England, when his Honour by his decree, bearing date the 25th of November, 1826, declared as to the construction of the words contained in the will of the said testator, that is to say, "except the timber growing in the park "avenues, demesne lands, and woods adjoining to "the capital messuage called Arbury, in the said "county of Warwick," the words "demesne lands" denote the lands comprised in the map exhibited in this cause, marked with the letter B; and the words "woods adjoining to the capital messuage

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“ called Arbury,” with the word “ avenues,” include the woods after mentioned, viz. Birch Wood, Alders Wood, Coventry Wood, the Ash Plantation, Great Hawkeswood, and Little Hawkeswood, and all other woods or timber trees through or by which the road or avenues leading from the North Lodge towards the capital messuage called Arbury, or the roads and avenues leading from Astley Lodge or Griff Lodge to the said capital messuage respectively, passed at the time of the death of the said testator. And it was ordered that the injunction granted in the cause, to restrain the Respondent from cutting down and felling the timber on the said estates, should be continued as to the timber growing in the park avenues, demesne lands, and woods adjoining to the said capital messuage called Arbury, and including therein the Birch Wood, the Alders Wood, Coventry Wood, the Ash Plantation, Great Hawkeswood, and Little Hawkeswood, and all other woods and timber trees through or by which the road and avenue leading from the North Lodge towards the capital messuage called Arbury, or the roads or avenues leading from Astley Lodge or Griff Lodge towards the said capital messuage, respectively passed at the time of the death of the said testator. And it was thereby further ordered, that it should be referred to the Master to take an account of all the timber that had been cut or felled, by or by the order of the Respondent, in the park avenues, demesne lands, and woods before particularly named and described, and of the money received by the Respondent, or by any person or persons by his order or for his use, from the sale thereof; and the said Master was also to take an account of the money paid by the

Respondent into the bank, to the credit of this cause, "the account of the Arbury demesne lands," in-respect of such timber as had been sold by him, and also an account of the money produced by the sale of such part thereof as had been sold under an order of the said Court, and received by Mr. Lees the auctioneer, and paid by him into the bank, in trust in this cause generally; and in order thereto all parties were to produce upon oath all books, papers, and writings in their custody, and be examined upon interrogatories as the Master should direct, who was to make them all just allowances; and the said Master was to tax all parties their costs of the suit as between solicitor and client, in manner therein mentioned, and to make a separate report thereof; and the said master was also to ascertain how much of the 370*l.* 12*s.* 6*d.* bank three per cent. consolidated annuities standing in the name of the Accountant-general, in trust in this cause, had arisen from the sale of timber felled in the park avenues, demesne lands, and woods therein-before particularly named and described, and how much had arisen from sale of timber felled on other parts of the said estates in the pleadings mentioned; and it was thereby declared that so much thereof as the said Master should find to have arisen from the sale of timber felled on such other parts of the said estate, together with the dividends and interest which had arisen thereon, was to go and be applied in satisfaction of what should be found due from the Respondent on taking the accounts thereby directed, or of so much thereof as the same would extend to satisfy and discharge; and if more than sufficient for that purpose, the residue thereof was to belong to the Re-

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spondent for his own use and benefit. And it was further ordered, that the said costs, when taxed, should be paid out of the said sum of 3704*l.* 12*s.* 6*d.* bank three per cent. annuities to the persons, and in the manner, and under the directions therein contained in that behalf; and the Court continued the reservation of all further directions and subsequent costs, until after the Master should have made his general report, with liberty for any of the parties to apply as there should be occasion.

On the 3d of July, 1827, the Appellants filed another bill in the Court of Chancery against the Respondent, which, after stating the proceedings in the former suit, alleged that the Appellants had, since the hearing of the cause and the decree, been informed, and believed, that the timber and other trees growing and standing in the wood, called Seaswood, and upon the farm, called Temple House Farm, were planted and left standing for ornament and shelter to the mansion-house, called Arbury, and were of remarkable fine growth when the Respondent took possession of the said estates and premises; and that the Respondent had cut down and felled the same, whereby he had injured the inheritance: and the bill prayed an account of the timber and other trees so cut by the order of the Respondent in the wood called Seaswood, and upon the farm called Temple House Farm, and of the monies produced by the sale thereof, together with the consequential directions.

The Respondent appeared to the bill, and put in a plea of a former suit depending for the same matter, and orders of reference having been made to ascertain the truth of the plea, the Master made his report thereon on the 1st of April, 1828, and

the plea came on for argument on the 18th of November, 1829, before the Vice-Chancellor, who overruled the plea.

On the 14th of January, 1830, the Respondent presented his petition in this cause to the Right Honourable Lord Lyndhurst, the then Lord High Chancellor, whereby, after setting forth the proceedings therein, and the decree of the Vice-Chancellor, he stated that he was aggrieved by the form of the decree; for that the decree did not dismiss the bill of the Appellants, so far as the same sought an account from the Respondent of any trees which had been cut down and felled by the order, or with the permission of the Respondent, upon any part of the estate and premises thereinbefore, and in the pleadings of this cause mentioned, other than the trees which had been cut down and felled by or by the order of the Respondent, in or upon the park avenues, demesne lands, and woods adjoining the capital messuage called Arbury, as declared, named, noted, and described in and by the said decree, either as trees protected by the exception therein contained in the said testator's said will, or as trees growing or alleged to have been growing upon the said estate, and planted, left standing, and intended for ornament and shelter to the said mansion-house called Arbury, and the house alleged to be the mansion-house called Astley Castle, and the farm houses, buildings, gardens, and pleasure grounds to the same belonging, and the account of the monies received by the Respondent or by his order from the sale thereof, and to have the amount thereof secured and invested for the benefit of the persons entitled or to become entitled to the said estates

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under the said will of the said testator Sir Roger Newdigate; and so far as the said bill sought to restrain the Respondent, his servants and workmen, by the injunction of the said Court, from cutting down timber trees growing in and upon the park avenues, demesne lands, and woods adjoining to the said capital mansion-house called Arbury, other than and except in the park avenues, demesne lands, and woods adjoining to the said capital mansion-house called Arbury, as named, described, or denoted in and by the said decree as aforesaid, and from cutting down timber and other trees growing in and upon the said estate and premises in the said county of Warwick, which had been planted or growing thereon for the protection or shelter of the said mansion-house called Arbury, and the alleged mansion-house called Astley Castle, or for the ornament of the said mansion-house and alleged mansion-house and estates, or either of them, or which grow or stand in lines, walks, avenues, clumps, or otherwise, for the ornament of the said mansion-house and alleged mansion-house or either of them, or the gardens, pleasure grounds, and buildings thereto belonging, save and except on such part or parts of the said estates and premises as are included in and protected by the said decree; and the Respondent prayed his Lordship to rehear the cause, and that the said bill of the Appellants, as far as it prayed any relief against the Respondent in respect of the matters therein and before particularly set forth, might be dismissed out of the said Court.

The petition was heard on the 25th of January, 1831, before Lord Brougham, then Lord High Chancellor of Great Britain; and by an order



made on the 31st of January, 1832, his Lordship ordered that the decree of the Vice-Chancellor, bearing date the 25th of November, 1826, should be varied by adding, after the timber accounts thereby directed to be taken in the manner in the said decree mentioned and directed, the following words: — “ And it is ordered, that the Plaintiff’s  
 “ bill do stand dismissed out of this Court, so far  
 “ as the said bill seeks an account of the timber  
 “ cut and felled by the order or for the use of the  
 “ Defendant, in any of the woods called Firtree  
 “ Grove, Dagley’s Wood, Lady Wood, Jeff’s Wood,  
 “ and Seas Wood, or on Temple-house Farm, or in  
 “ or upon any other part or parts of the estate and  
 “ premises herein-before and in the pleadings of  
 “ this cause mentioned, other than the trees which  
 “ had been cut down and felled by or by the order  
 “ of the Defendant in or upon the park avenues,  
 “ demesne lands, and woods as before declared,  
 “ named, noted, and described in and by the said  
 “ decree, and an account whereof is by the said  
 “ decree directed to be taken as aforesaid.”

The appeal was against this decree.

For the Appellants, the *Solicitor-General* and  
 Mr. *Jemmett*.

It appears by the evidence that trees planted and growing for shelter and ornament of Astley Castle, and in the avenue joining the mansions of Arbury and Astley Castle, were cut by the Respondent: it also appears that Astley Castle, before the year 1807, was not used as a residence, being then, and probably long before, in a state of decay; but it was afterwards repaired by the Respondent, and leased to one of his sons as a residence.

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Where there has been actual or threatened waste, if one act is proved an injunction is granted which protects the whole estate. The right to a general account at the hearing follows the injunction. It is not necessary to proceed at law, *Jesus College v. Bloom*\*, *Smith v. Cooke*.† The same point occurs incidentally in *Pulteney v. Warren*.‡ The account is not to be confined within the limits of the exception, since there is evidence that the testator must have intended to protect the other parts in question, as being ornamental and within view of the principal mansions. The word “adjoining,” as applied to woods by the testator, cannot mean “contiguous,” for none of the woods are contiguous to the house. So as to avenues, there are none in the park or demesne lands, or contiguous to the house. Spring Kidden Wood was held by the decree of the Vice-Chancellor to be within the exception; yet it is not contiguous to the house; and the decree, upon the same ground, ought to have included Seas Wood, and other woods. It is argued that the rule of equity does not apply, because Astley Castle was out of repair, and not used as a family residence by the testator. But the application of the rule cannot depend upon such accidents. In the case of Wanstead House the injunction to protect timber as ornamental was granted, although the mansion was pulled down by those who had the right.

The decree of the Vice-Chancellor left to the Appellant the opportunity of enforcing this equity, which was done by the supplemental bill. The dis-

\* 3 Atk. 262.

† 3 Atk. 378.

‡ 6 Ves. 89. See *Grierson v. Eyre*, 9 Ves. 346.; *Whitfield v. Bewitt*, 2 P. W. 240.; *Garth v. Cotton*, 3 Atk. 751.

missal of this bill on appeal deprives the Appellant of relief as to equitable waste. At the original hearing, the discussion was confined to the question of parcel or no parcel, within the exception clause. Upon the question of equitable waste there has never been any adjudication. No application was made at the hearing to dismiss the bill in this respect. If it had been so dismissed upon the strict rule of pleading, upon a sound exercise of the discretion of the Court that there might be no failure of justice, it should have been without prejudice to the filing of another bill. Lord Redesdale treats this as a matter of ordinary practice.

At law, the Plaintiff has the right at all times, up to the last moment, to be nonsuited. So in equity, by analogy, and upon principle, where any substantial question remains to be tried, the opportunity for trial should be reserved by the Court.

*The Lord Chancellor :*

Was any application for the purpose made to the Court?

For the Appellant :

No, because the bill was not dismissed.

For the Respondent, Sir *Edward Sugden* and *Mr. Bridger*.

The injunction was limited, and there is no right in equity to an account beyond the limits of the injunction. The accident that the bill was not dismissed cannot give the right to extend the relief given by the decree. The original bill prayed relief as to equitable waste, and interrogatories were filed with a view to prove it; but the case was not supported by evidence. If the allegation had been supported by any proof, an issue might have been directed upon the question. This was refused by the Court, and the relief confined to legal waste

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within the exceptive clause. The proof of cutting two or three trees about Astley House did not support the case. The protection by the words of the will extends only to the capital mansion. Astley House was for a long time in a state of ruin. There was no proof of cutting timber growing for ornament or shelter beyond the excepted parts. Relief as to equitable waste was therefore refused by the Court, which was tantamount to a dismissal of the bill as to that part of the prayer for relief; and the decree might consequently have been so drawn up by the Respondent. The right to the account is limited by the injunction. There could be no decree for an account where the injunction was refused. This is, therefore, equivalent to a dismissal of the bill to that extent. It is in proof that Astley Castle was not used in the time of the testator as a family residence. The doctrine of equitable waste, therefore, cannot apply; and if it did, and the evidence extends only to the cutting of two or three trees, how is it possible that such proof can give the right to an account over an estate of 5000 acres? The Vice-Chancellor was at first disposed to grant an issue as to equitable waste in Seas Wood; but finding that a case on that point was made by the bill, that the fact was put in issue, and the opportunity of proof provided by the Plaintiff, but no proof made, he refused the issue. This was a decree that the equitable waste intended as to Astley Castle did not extend to Seas Wood, and was substantially a dismissal of the bill as to that matter against which there has been no appeal.

The *Lord Chancellor*. — This case was a question of ornamental timber or not with respect to one part of the woods of a very large estate, and I had a doubt whether the use that was made of

one of the houses showed or not that it was to be taken to be ornamental timber of a capital mansion, which was used up to a late period by the sister of the testator. I have looked into the case, and all the evidence, and I remain of the opinion which I expressed in the Court below, and which coincided with that of his Honour the Master of the Rolls; I remain of opinion that it was well decided at the Rolls, and that the judgment I came to in affirming that decision at the Rolls was right. It was not lightly that the affirmance took place; for thinking there was some doubt on the evidence, I stated to his Honour the arguments in writing. I gave him a very full note of the argument. I sent it to him, with my own observations upon it. We had much communication together on the whole matter, and I received in writing from his Honour the result of his recollection of his reasons for deciding the case at first, and the result of his distinct deliberation upon it when he had had the benefit of the notes which I gave him of the full argument before me, as well as any little benefit which might be supposed to have been additionally given him by the queries which I suggested to him upon that argument. It was upon the result of the whole of those considerations that his Honour retained his former opinion, notwithstanding some new light might have been thrown upon it by the arguments in the Court of Chancery; and it was after deliberation with his Honour, and reconsideration of the case, that I came ultimately to the opinion which affirmed the judgment of the Master of the Rolls, having taken time during the long vacation to consider it.

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I have fully considered the argument upon the appeal to this House; and if I had seen reason for it, I should have been ready to retrace my steps and reverse his Honour's judgment below, as well as my own judgment in the Court of Chancery.

Under these circumstances, I do not propose to enter into the argument upon the question, as it is very much of fact, nor to detain your Lordships unnecessarily by going into the arguments at the bar. Very great attention was paid to the case upon argument here. No stone was left unturned; and if any new light could have been thrown upon the case, I should willingly have opened my eyes to it. I have refreshed my memory from my notes, and I remain clearly and very decidedly of opinion that the judgment of the Court below in this case ought to be affirmed.

It is not a case in which I think there should be any hesitation in giving the costs of the affirmance. I see no reason whatever in a case of this sort, where there have been two consecutive judgments, and no doubt is expressed, either below or in the Court of Chancery, and great deliberation given to the case, rather on account of the zeal of counsel than that there was any doubt that might hang over it. Under these circumstances, it is suggested that I should move your Lordships to give the costs out of the timber fund; but I think there should be a limit to that. I think the estate should not be charged with all the costs; otherwise we should have no end to litigation, where there is a fund. I think there must be 100*l*. costs paid by the Appellants.

Judgment affirmed.

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Short-hand writer's report of the judgment pronounced by the Vice-Chancellor, Sir John Leach, on the hearing of this cause on the 25th November, 1826 : —

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*The Vice-Chancellor.* — The testator in this case states that all this estate is to be enjoyed by the defendant; and he states it is to be enjoyed by him as tenant for life, without impeachment of waste, with an exception; and the words of the exception have given occasion to the present suit. The exception is, "Except the timber growing in the park, avenues, demesne lands, and woods adjoining to the capital messuage called *Arbury*;" and the duty of the Court now is to give a construction to these words, which certainly are not extremely definite in their meaning. On the part of the Plaintiff, it is contended upon the present occasion, that the true intent and meaning of this testator was to deprive the tenant for life of a power of cutting timber over the whole of the estate.

If I were to give that construction to the will, I should not be acting upon the will of the testator according to his expressions; but in fact, I should be making a will for him, upon a supposed intention, which he has not, in any kind of way, expressed. He has not restrained the tenant for life from cutting timber upon all the estate, but he has restrained him only from cutting the timber growing in the park, avenues, demesne lands, and woods adjoining to the capital messuage called *Arbury*; and it is utterly impossible, therefore, that upon any construction of that sentence, these words can be extended beyond any force that can be derived from the expression, "Except the timber growing in the park, avenues, demesne lands, and woods adjoining to the capital messuage called *Arbury*." On the part of the Defendant, it is contended that by the expression "woods," what the testator meant was not "woods" generally, but "demesne woods;" and that this is to be construed "demesne lands and demesne woods adjoining to the capital messuage called *Arbury*." Now I should misapprehend the intention of the testator, if I thought that the adjective "demesne" was an adjective qualifying the word woods. According to my construction of the testator's meaning, it is not the term "demesne" that is the qualifying term, but the qualifying term is "adjoining;" for this must be read according to plain sense and plain grammatical construction. "Except the timber growing in the park." What park? "Except the timber growing in the avenues." What avenues? "Except

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"the timber growing in the demesne lands." What demesne lands? "Except the timber growing in the woods." What woods? Why, he tells us, "adjoining to the capital messuage called Arbury, in the said county of Warwick." The construction, therefore, is perfectly plain — it is perfectly capable of a clear grammatical construction; and the question is, what is the intention which the testator has expressed by that clear grammatical construction?

The first consideration is (which was not adverted to in the arguments), did the testator mean by this exception to give to this tenant for life, without impeachment of waste, a larger right of cutting timber upon the estate than the rules of law would give to him? or did he mean to limit and restrict the right which the rules of law gave him? If I am to adopt the argument used on the part of the Defendant, I must come to this conclusion, that the testator did not mean to qualify the right, but meant to enlarge the right which the tenant for life would have by the rules of law and equity. I cannot give that construction to the words which were introduced by way of exception, because, I am clearly of opinion that they were introduced by way of restriction. If then these words were introduced to operate by way of restriction to the right, let us see how that right would have stood if it had not been that these words were so introduced. What then would be the right of this Defendant, if this exception had not found its way into the will of this testator? Could this Defendant have acted in such a way as to show that he considered himself authorised to cut the timber mentioned in the exception, which was intended to have restricted his right? It cannot be questioned, that if even this exception had not found its way into the testator's will, the Defendant would have been restrained from committing what is called equitable waste, and he could not have cut any timber planted or left standing to afford ornament or shelter to the mansion or house. If this reasoning applies, then, looking at the intention of the testator, I must say, that under this exception this Defendant can never claim a title to commit what is called equitable waste — waste which he could not have committed, if even the exception had not been introduced into the testator's will. The words used are (to repeat them), "Except the timber growing in the park, avenues, demesne lands, and woods adjoining to the capital messuage called Arbury, in the said county of Warwick." This phrase, "the timber growing in the park adjoining the capital messuage called Arbury, in the said county of Warwick," is very clear. "The timber growing in the ave-



“hues adjoining to the said capital messuage called Arbury, “in the said county of Warwick,” is not so clear. There are no avenues immediately “adjoining to the capital messuage “called Arbury, in the county of Warwick.” The meaning of “the timber growing in the demesne lands adjoining the capital “messuage called Arbury, in the said county of Warwick,” is perfectly clear. They are adjoining to the capital messuage, and “adjoining to” does not mean immediately contiguous — immediately *touching* the capital messuage; but they are demesne lands adjoining, because there are lands upon that estate known for centuries as demesne lands. Then comes the expression, “Except the timber growing in the woods adjoining “to the capital messuage called Arbury, in the said county of “Warwick,” that is to say, “*abutting* the said capital messuage;” but that cannot be the *meaning*, because a capital messuage would not be habitable if there was a wood abutting it, and therefore we cannot affix that sense to the phrase. What then is the sense which this Court is to attribute to the language of the testator, consistently with the common feelings of mankind? What was the motive which this testator meant to indicate by this exception? The motive must have been the preservation of all timber which was connected with the enjoyment of the capital messuage,—any timber, which served in any manner, according to the language of a Court of Equity, for the purpose of ornament, or for shade or shelter, to “the capital messuage “called Arbury, in the said county of Warwick.” If such were the motive, then we have a clear clue to the meaning of the word “adjoining.” I interpret it adjoining, or near to, adjoining, or so near to as to be connected with the enjoyment, or as to serve for ornament or shelter. This is the principle of construction which I feel myself bound to give to this will; and I must now, therefore, proceed to examine whether these several places in which the Defendant has thought he had a title to cut timber, of which the Plaintiff complains, are or are not places connected with the enjoyment of the capital messuage, or are or are not so near to the capital messuage as it must be inferred that the timber either to be planted or left standing there was for the ornament or shelter of the capital messuage.

Now, in the first place, to begin with what is called the strongest part of the case by the other side; namely, the wood called Birch Wood, or The Alders' Wood. The wood called Birch Wood and The Alders adjoins to the north to a certain wood called Spring Kidden Wood. It seems that originally the ornaments of this place determined at Spring Kidden Wood;

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for before the last fifty years, there was nothing ornamental in that direction beyond Spring Kidden Wood, except the avenue from Spring Kidden Wood to Hart's Hill. It is not clearly stated, but I think in the old map of 1694 it distinctly appears, that about fifty years since, an inclosure took place to the north of the boundary of Spring Kidden Wood; and upon the occasion of that inclosure, it seems that the land there adjoining to Spring Kidden Wood was allotted to the testator, Sir Roger Newdigate, and he immediately covered the whole of the land with a plantation of wood, and there he built a lodge at that point leading to Hart's Hill, where the avenue terminated. First, it is contended that the converting that approach to his house into a sort of principal or ornamental approach by the building of a lodge at one extremity, and by planting the intermediate space, does not prevent the right to cut timber in woods through which the avenue may go, according to the intention of the testator, because about a hundred years ago (as for example) it was only open and unclosed common. Now, this Court is not to examine into a consideration of that which was connected with this park fifty years ago or a hundred years ago, but this Court is only to inquire into that which was connected with the park at the time this testator made his will and died. That this wood was plainly connected with the ornament of the park by the building of the lodge, I think to be so clear that my declaration will be, that this wood passed by the intention of the testator according to the words he has used, fairly interpreted. The next wood of any considerable value is a wood called Coventry Wood, which has an extremity on this side to the eastward. Coventry Wood has a termination for it which forms a sort of angular point; it has its termination at a point where a lodge has been built, which forms one of the approaches to the mansion-house, standing upon the edge of a public road. This is a building at the extremity of a wood, that extends *nearly* to the park, not entirely to the park. The wood does not extend entirely to the park; there is a space of some acres between the termination of the wood and the park, and an avenue is carried from the wood through those acres to the park, the road being continued, as it must be, through the wood to the park, and through the park up to the mansion-house.

Now, it appears in the statement made by some of the witnesses examined on the part of the Plaintiff, that when Sir Roger Newdigate had built this lodge, and made this approach through Coventry Wood, he did not content himself by considering that the wood through which the avenue passed was a sufficiently ornamental approach, but he planted certain fir trees on each

side; and it is contended on the part of the Defendant, that the testator only meant that these fir trees were for the purpose of making the approach more ornamental. I am of opinion that this was an approach through this wood, connected with the enjoyment of the house, and serving for the ornament of the house; and Coventry Wood, in my opinion, is equally within the particular protection of the testator's words with the other wood.

There remains, now, only one other species of wood or timber about which any dispute is raised, with the exception of Seaswood, which I have reserved for the last consideration.

From this lodge, built at the extremity of Coventry Wood, there is a road which goes directly through the park; when it has advanced a certain distance, there is an avenue which turns to the right, and leads immediately to the mansion-house. The road, however, continues straight forward to the west. It continues straight forward through a wood, which is called "The Park Wood;" after passing the Park Wood, it proceeds through a certain plantation called the "Ash Plantation;" cutting the Ash Plantation, it passes through a small wood called "The Little Hawkeswood;" and proceeds some distance along with the trees on one side, but not appearing to have trees on the other side until it reaches Little Hawkeswood; and then it proceeds through Great Hawkeswood, and then proceeds to another lodge, forming the approach from another part of the country from the western district to the mansion-house. The question is, whether any of these woods, the Park Wood, the Ash Plantation, Little Hawkeswood, or this line of trees, or Great Hawkeswood, are or are not to be protected by the exception in this testator's will? With respect to the Ash Plantation, that was merely appropriated to the cultivation of ash poles, which were occasionally cut; and, therefore, according to the custom of the country, there could be no timber upon that. If there was timber, however, upon it, it is my opinion that timber ought to be protected, as ornamental to the house. My opinion is the same with respect to the two woods, the Great Hawkeswood and the Little Hawkeswood. It is contended, on the part of the Defendant, that though this might be an avenue, a road going through a wood may be considered as an avenue; but it is not considered to extend to the wood, and all which did not form the avenue might be cut away. I am not of that opinion; I am of opinion that the whole of this is "wood," in the sense of the testator, "adjoining to the capital messuage called Arbury;" namely, connected with the

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capital message, and serving for its ornament. It is certainly true that some of the witnesses on the part of the Defendant thought the space between the two Hawkeswoods (inasmuch as it is bounded by trees only on one side) did not form an avenue. The witnesses on the part of the Plaintiff call it an avenue; and, in my opinion, so call it an avenue within the sense of the testator's meaning: and I am of opinion that all the timber growing between Park Gate and Astley's Gate is timber, within the testator's intention.

A very important question arises with regard to Seaswood; and upon the evidence in this cause, I must admit that there is no evidence which proves it is within the words of protection used by the testator, according to the sense which I think it my duty to put upon the expressions of the testator. If that point could have been distinctly raised before the hearing of this cause, and if the Plaintiff could have been advised as to the opinion which the Court would entertain upon the construction which it puts on the words of this exception, then the want of evidence on the part of the Plaintiff must have been considered as conclusive against him; and the sense of the testator which he contends for could not have been considered by the Court as established by the testimony that this was ornamental to the house; as to that part of his claim his bill must have been dismissed. This Plaintiff, however, was not advised, nor could he have known until these arguments had been heard which have been urged to-day, what view the Court would have taken upon hearing the whole of the case. This Plaintiff therefore cannot reasonably be charged with having neglected the means of evidence which might be in his power. The construction which he put upon this will is a much larger construction than the Court gives it upon the present evidence; and according to the larger construction, the evidence on his part should prove Seaswood to be ornamental to the estate. I am of opinion that I cannot, with justice to the Plaintiff in this case, exclude him from the opportunity of establishing (provided the facts the case will enable him to do so) that this wood was either planted or left standing for ornament, shade, or shelter to the mansion-house. For ornament, shade, or shelter to the mansion-house the Defendant says it could not be; and my purpose therefore is, in declaring my opinion as to these points, to give the plaintiff by an issue an opportunity of trying whether Seaswood was at the time of the death of the testator either planted or left standing for ornament, shade, or shelter to the capital message called Arbury.

Mr. *Shadwell*. — Then there is no difficulty left between us.

Mr. *Sugden*. — I beg your pardon, that leaves it all open; your Honour will observe that they don't contend by their bill what they contend in argument; they throw a large net to get all they can, but I don't apprehend their bill puts it in that way.

Mr. *Shadwell*. — I beg your pardon. "And that the said Defendant, Francis Newdigate, may set forth in manner afore-said a full, true, and particular account of all such trees as were growing in the park, avenues, demesne lands, and woods adjoining to the said capital messuage called Arbury, and also of all such trees as were growing upon the said estates, and in the said county of Warwick, and intended for ornament and shelter."

The *Vice-Chancellor*. — That looks as if you had the opportunity which I thought you had not; that is very different from your argument.

Mr. *Sugden*. — They not only claim all the woods that have been cut, but they go on to pray that what was left may be equally protected; and therefore that excludes them from the presumption that they had not the opportunity of giving evidence, which your Honour supposes.

The *Vice-Chancellor*. — I could only let you into evidence on the ground that the view the Court might take of it was not present to your minds; but it seems by the statement of the bill that is the very view you took of it. I cannot possibly permit them, therefore, to go to an issue now, having had an opportunity of giving evidence, and therefore I must conclude the fact is against them.

Mr. *Jemmet*. — We had no view with regard to the opinion your Honour would give as to Seaswood; but we did pray with respect to the ornamental timber as to Astley Hall, because that is a mansion upon the estate.

Mr. *Sugden*. — The prayer of the bill will put at end to the whole of this argument, — "That an account may be taken, by and under the direction and decree of this Court, of all and singular the trees which have been so cut down or felled by the order or with the permission of the said Defendant, and of the monies which have been received by him, or by any person by his order, or for his use, from the sale thereof; and that the Defendant may be decreed to answer the amount of such monies, the Plaintiff hereby waiving all pains and penalties incurred by the said Defendant for committing waste on the said estates and premises; and that such timber as has been cut and still remains in and about the said park, avenues, demesne lands, and woods adjoining to the said messuage

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" called Arbury, may be sold by the direction and decree of  
 " this honourable Court ; and that the amount of such monies as  
 " aforesaid, together with the amount of the monies to arise  
 " from and by such sale as last aforesaid, may be secured and  
 " invested by and under the like direction and decree for the  
 " benefit of the persons entitled and to become entitled to the  
 " said estates, under the said will of the said testator, Sir Roger  
 " Newdigate ; and that the said Defendant, Francis Newdigate,  
 " his servants, agents, and workmen, may be restrained by the  
 " order or injunction of this honourable Court, from cutting  
 " down timber trees growing in and upon the park, avenues,  
 " demesne lands, and woods adjoining to the said capital mes-  
 " suage called Arbury, and from cutting down timber and other  
 " trees growing upon the said estates and premises in the said  
 " county of Warwick which have been planted or growing there,  
 " for the protection or shelter of the said mansion-houses called  
 " Arbury and Astley Castle, or either of them, or for the orna-  
 " ment of the said mansion-houses and estates, or either of them,  
 " which grow or stand in lines, walks, avenues, clumps, or other-  
 " wise, for the ornament of the said mansion-houses or either of  
 " them, or of the gardens, pleasure grounds, or buildings there-  
 " unto adjoining ; and from selling or removing, or causing to  
 " be sold or removed, any of the said trees which have been  
 " felled as aforesaid, and now remain upon any part of the same  
 " premises which have not yet been sold or disposed of."

The *Vice-Chancellor*. — That is decisive.

Mr. *Sugden*. — And therefore there will be no issue. Then your Honour's decision is, that the woods within the lodges are protected ?

The *Vice-Chancellor*. — All woods within the lodges are protected, in my opinion.

Mr. *Sugden*. — And as to Seaswood, your Honour is of opinion that that is not protected ?

The *Vice-Chancellor*. — No ; but I am of opinion that the woods within the lodges are protected, and I hold them to be protected because they are ornamental.

Mr. *Shadwell*. — In consequence of this declaration, the money arising from timber which has been cut in parts which are protected, according to your Honour's opinion, will be paid into Court ; and perhaps your Honour would also think that as this question has been agitated for the benefit of the estate, it would be a fair and right thing that the costs of both parties should come out of that fund which has arisen from the sale of the timber which your Honour holds to be protected.

The *Vice-Chancellor*. — I don't know how I can do that with justice.

Mr. *Shadwell*. — My client, who is tenant in tail, must have his costs. I have one client who is tenant for life, and the next is tenant in tail.

The *Vice-Chancellor*. — Is the tenant in tail of age?

Mr. *Shadwell*. — No; he is an infant.

The *Vice-Chancellor*. — What has become of the personal estate of the testator? The personal estate would be the proper fund.

Mr. *Shadwell*. — There is no personal estate.

The *Vice-Chancellor*. — Then I must throw it upon the real estate; and then it will come out of the proceeds of the timber.

Mr. *Shadwell*. — Then, in point of fact, there will be a reference to the Master?

The *Vice-Chancellor*. — Yes, you must refer it to the Master to take an account.

Mr. *Shadwell*. — The injunction will only be continued with respect to those woods which your Honour is of opinion come under the protecting clause in the testator's will.

The *Vice-Chancellor*. — All timber growing within the lodges.

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Short-hand writer's report of the Lord Chancellor's (Lord Lyndhurst's) observations on the hearing of the Defendant's appeal to vary the decree, on the 20th November, 1830: —

If I recollect, the learned judge says, in substance, this. — In the first place, it was not easy for the parties to be aware what my judgment would be. In that respect, they might not be prepared with evidence as to equitable waste as to Seaswood, they may not have their attention directed to it; but afterwards the attention of the learned judge was called to the prayer of the bill, and he said that the prayer of the bill was such as to show that their attention was directed to the subject, and they ought to have applied their evidence to it; and upon that ground he gave his decision against what he had before determined, granting an issue. I believe I am right. Is it not in substance this, that you prayed for something, Mr. Pepys, in that suit, which was decided against you?

Mr. *Pepys*. — There was no decision at all. The Court was of opinion that we had not done that which we might have done in the cause, and would not give us any further inquiry on the

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subject, and would not give us, in that suit, an opportunity of proving equitable waste.

*The Lord Chancellor.* — The Court was not asked to dismiss the bill. The only question is, whether the bill would have been dismissed on that statement of facts, and that judgment with respect to the merits pronounced by the Vice-Chancellor; whether, if his attention was called to them, and he was asked to dismiss the bill, whether, as a matter of course, and as a necessary consequence of that which he would decide, he would dismiss the bill.

*Mr. Pepys.* — No judge would have ever dismissed such a bill otherwise than without prejudice.

*The Lord Chancellor.* — It is a very singular thing, if a party in a suit at common law fails entirely, he can be nonsuited, and he has a right to come again; if, on the contrary, he succeeds in part, and there is a part to which he might have applied evidence with respect to which he fails, he is defeated with respect to that for ever. That is the distinction at law.

*The Solicitor-General.* — It is just the same thing here.

*The Lord Chancellor.* — The question is, whether that rule applies to a suit in equity.

*Mr. Pepys.* — No, never.

*The Lord Chancellor.* — There are two things you pray for. If you had failed in both, might you have come again here?

*Mr. Pepys.* — No, my Lord, if the bill was dismissed.

*The Lord Chancellor.* — That would be without prejudice, as in the case of a nonsuit.

*The Solicitor-General.* — If they had gone into evidence, and failed because they had not produced sufficient evidence, the dismissal of their bill would have been fatal to them for ever.

*The Lord Chancellor.* — Suppose they had gone into a case wide of the real case, so that the Court saw that the merits were not discussed, then the Court might have said it was without prejudice.

*The Solicitor-General.* — There have been only one or two cases of that sort which have happened in the course of my experience.

*Mr. Pepys.* — That is a very singular thing; because I have known them to happen continually.

*The Solicitor-General.* — Perhaps your Lordship will ask the Registrar about the frequency of those things?

*The Lord Chancellor.* — I will ascertain that. That is the point; in fact, that is the whole point; there is no dispute about the facts.



It would have been much better for the parties to have had an issue, notwithstanding what took place, than to have dismissed the bill without prejudice to a new suit. They might have had an issue directed in that suit; whereas the effect of dismissing the bill without prejudice, if that is the real question to be tried, leads to the necessity of bringing a new suit, and going through the whole case again.

*Mr. Pepys.* — It was quite in the breast of the judge to have dismissed the bill without prejudice, but it was not in the breast of the judge to direct an issue.

*The Lord Chancellor.* — With respect to the dismissal of the bill without prejudice, that is a question of course for the discretion of the Court. It was suggested the last day when this was on, that the most convenient mode would be to ask the Master of the Rolls himself, who decided the case, what he intended. Do you propose that?

*The Solicitor-General.* — I have not the least objection to it.

*The Lord Chancellor.* — Then you propose it.

*The Solicitor-General.* — I propose it certainly, but my friend withdraws from it.

*Mr. Pepys.* — It is quite clear that the Master of the Rolls' attention was not called to it.

*The Lord Chancellor.* — The Master of the Rolls has the reviving his recollection from the notes now before me, which give with great accuracy the effect of what passed in his mind and what he intended. If on consulting with the Master of the Rolls he should say that he formed no judgment about it, then that is one question, — then it will be for me to decide what is proper to do; if, on the other hand, he said I did consider it at the time, and the decree was framed according to the judgment I then pronounced, there is an end of it.

*Mr. Pepys.* — It is four years since the Master of the Rolls heard the case.

*The Lord Chancellor.* — Here are the materials before me which represent what passed upon the occasion with great accuracy. I have read so much of it as to enable me to form an opinion; at all events I think it would be proper for me to speak to him on the subject. If he says he has no recollection about it, and cannot tell what he intended to do, why I must decide it without his recollection. It does not admit of more argument than I have already before me, does it?

*The Solicitor-General.* — Those passages I read to your Lordship before show what I before observed as to what he meant and would have done; he says, "If that point could have been

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"distinctly raised before the hearing of this cause, and if the Plaintiff could have been advised as to the opinion which the Court would entertain upon the construction which it puts on the words of this exception, then the want of evidence on the part of the Plaintiff must have been considered as conclusive against him, and the sense of the testator which he contends for could not have been considered by the Court as established by the testimony that this was ornamental to the house. As to that part of his claim his bill must have been dismissed." That is what he said when he was of opinion that the bill was not to be dismissed, because he thought they had not an opportunity of looking into it.

*The Lord Chancellor.* — He would naturally have applied his evidence to every part of the bill as to which the slightest doubt existed which came within the explanation. How far is Seaswood from the mansion-house?

*The Solicitor-General.* — A quarter of a mile.

*The Lord Chancellor.* — Is it in sight of the house?

*The Solicitor-General.* — No, my Lord. Mr. Lowe knows the place perfectly well, and he says that you cannot see the top of the highest tree in Seaswood from any part of the pleasure grounds.

*Mr. Jemmett.* — There is no wood strictly adjoining to the mansion-house.

*The Lord Chancellor.* — I am asking the question in order to see what construction the learned judge put upon the word "adjoining;" there might be woods round the mansion-house, although not strictly adjoining; and if there was another wood separated by a considerable interval, which is Seaswood, then that would not properly come within the term "adjoining." These are the words which are used by the Master of the Rolls. Here is the passage read by the Solicitor-General: "I could only let you into evidence on the ground that the view the Court might take of it was not present to your minds; but it seems by the statement of the bill that is the very view you took of it. I can't possibly permit them therefore to go to an issue now, having had an opportunity of giving evidence; and therefore I must conclude the fact is against them." That case having been present to your minds, according to the opinion of the Master of the Rolls, and you having had an opportunity of being prepared with evidence; and not being prepared with evidence, you wish now to have an opportunity of filing another bill for the purpose of having it again present to your minds for the purpose of repairing your own omission.

That is the language used by the then Vice-Chancellor on the subject. Suppose you file a bill embracing two distinct demands, you ought to be prepared with evidence to support each, according to the terms of your bill; you apply the evidence only to one, and fail as to the other entirely for want of evidence. Are you entitled to come again?

Mr. *Pepys*. — Not simply in that way.

The *Lord Chancellor*. — I am putting it as a boundary. You say that the circumstances of the case here were of such a nature that your attention was not directed to that point.

Mr. *Pepys*. — If we ever had any view of it, we lost sight of it in the progress of the cause.

Mr. *Jemmett*. — It is a question of great importance to both sides, and we humbly conceive that substantially the merits are with us, and that we ought to have the liberty to file a bill at our own peril. If we are wrong, we shall suffer for it.

The *Lord Chancellor*. — It is making the case rather hard upon them. The expense would be less to them if you had introduced the evidence into the former bill, than if you filed a second bill. Is the bill long? Allow me to see the bill. I will look at it, and tell you to-morrow morning what I think should be done. I will see the Master of the Rolls upon the subject.

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Short-hand writer's report of judgment pronounced by the Lord Chancellor (Lord Brougham) on the hearing of the Defendant's appeal to vary the decree, on 31st January, 1832:—

Sir Roger Newdigate gave to Francis Newdigate all his freehold estate in the county of Warwick and elsewhere, for life, without impeachment of waste, except the timber growing in the park, avenues, demesne lands, and woods adjoining the capital messuage called Arbury, in the county of Warwick, with divers remainders over. On the 26th of June, 1824, Charles Newdigate Newdegate, the first remainderman, brought his bill against Francis Newdigate, the tenant for life, stating that the Defendant had cut down timber on divers parts of the said premises, among which was a wood called Seaswood, and a farm called Temple House Farm, all which were expressly excepted as aforesaid; and the bill prayed an account of the trees so cut, and that the Defendant might be restrained from cutting down timber trees growing on any of the park, avenues, demesne lands, and woods adjoining to the house at Arbury, or on

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the said estate, which had been planted or were growing for the protection or shelter of the house, or for its ornament, which grew or stood in lines, walks, avenues, clumps, or otherwise. The Plaintiff claimed the extension of this exception to a mansion-house on the Arbury estate called Astley Castle; but as this point was decided against him, and not afterwards pressed, it is not necessary to notice it now.

The Plaintiff obtained an injunction in the terms of his prayer. The Defendant by his answer admitted having cut down timber in the park, avenues, &c.; but stated Seaswood did not form part of the demesne lands at Arbury, or lie intermixed therewith; and that Temple House Farm was also entirely distinct from the demesne lands on the Arbury estate, except one particular close; and he said that he ought not to be restrained from felling timber, except on such parts as the testator had previously excepted. This therefore raised the whole question. The pleadings here raised the whole question, if they chose, both as to Seaswood, as to the timber in the woods, and as to the timber in the park.

The Plaintiff entered into evidence, and examined his witnesses; and on the third interrogatory in his examination in chief, he interrogated as to the ornamental timber adjoining the mansion-house at Arbury, and that of Astley Castle; and the cause having come on for a hearing before the then Vice-Chancellor, the present Master of the Rolls, in November, 1826, his Honour specified the woods which he considered to be embraced by the said exception, such woods being in the demesne lands or avenues of Arbury House, or the land adjoining or ornamental thereto; and he observes with reference to Seaswood and Temple House Farm (neither of which come under the above description), the Plaintiff seemed to have conducted his case on the presumption that it was sufficient for him to establish that they were ornamental to the estate. The statement of the bill showed that the construction which the Court had set on the will could not have taken him by surprise; and it was therefore too late, it was said, for him to give evidence to prove Seaswood and Temple House Farm to be ornamental to the house of Arbury. His Honour's decree declares certain woods therein specified to come under the exception restraining the Defendant from cutting timber thereon, but Seaswood and Temple House Farm were not mentioned in the decree.

Now this is the judgment, the decree on which the present question arises. In the year after the decree, that is in January, 1827, the Plaintiff filed another bill against the Defendant,

stating the proceedings in the above-mentioned suit, alleging that the trees in Seaswood were planted and left standing for ornament, and were greatly ornamental to the mansion-house called Arbury. And the bill prayed an account of the trees planted and left standing, and intended for ornament in the said wood called Seaswood, and on the farm called Temple House Farm, or which contributed to the ornament or shelter of the said mansion-house called Arbury, or the park, pleasure grounds and buildings thereto belonging or adjoining. He had become instructed by the argument at the hearing, by the view the Court took at the hearing; because, finding that it was not sufficient to show that they were ornamental, that the woods were ornamental to the estate, and that it was necessary to show that they were also ornamental to the mansion, he appears to have thought he could mend his hand as it were, and by another bill obtain that relief which he had failed to obtain under the first; that appears at least to have been his proceeding. The Defendant pleaded the former bill as being for the same object, and still remaining of record undismissed in the Court; and on reference to the Master, he reported the said bill was for the same object as the former one, which had come to a decree; and that inasmuch as the accounts had not yet been taken, it was still remaining as of record and undismissed from the said Court. To this report the Plaintiff took exceptions, and they were overruled. The plea then came on for argument in November, 1829; and it was held to be insufficient, and overruled with costs: that bill therefore stands at present in point of form with the plea overruled. On the 29th of November, 1829, the Defendant presented his petition of appeal against his Honour's decree of November, 1826, with a view of introducing into the decree a clause dismissing those parts of the bill relating to Seaswood and Temple House Farm, and also an appeal by another petition from an order overruling the plea; that is to say, he complained of the decree of his Honour, because it did not dismiss the bill in so far as it related to those two parts with which he did not deal at all, for it ought to have dismissed the bill as to them. The matter was brought before the noble and learned Lord who preceded me in this Court on the 12th of February, 1830, on a motion which was for time to answer, when a discussion of considerable length took place on the effect of his Honour's judgment, and upon what had taken place at the Rolls. The appeal against the decree afterwards came to a hearing on the 20th of November, a short time before that learned Lord quitted the great seal; and a discussion was then

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revived as to what had taken place at the Rolls, the counsel being unable to satisfy his Lordship of the grounds of the Vice-Chancellor's (the present Master of the Rolls) judgment, and whether the omission of the clause of dismissal in the decree was a slip or not. His Lordship intimated that he should consult his Honour on the subject, and was prevented from doing this by his quitting the great seal within a very few days afterwards.

The case was then argued before me upon those two appeals: one appeal argued was the appeal from his Honour's judgment; and the question was (and on which I also said I should consult his Honour, as my noble and learned predecessor had done) as to the ground on which that omission in the decree had taken place; and upon the communication which I have had with his Honour, which my own mind on the argument and on the evidence in the cause entirely goes along with, I consider that that was an omission in the decree, from the matter not having been sufficiently brought to his Honour's attention when he disposed of the cause, and that therefore the decree must be so far altered as to dismiss the bill as regards the parts omitted — Seaswood; as regards the wood timber, so to speak, as contra-distinguished from the park timber; that it must be dismissed as to that, and dismissed without adding the words "without prejudice," without any addition of the words "without prejudice to bringing any other bill." I have no doubt whatever that point might have been raised before his Honour on those pleadings by both parties. The pleadings and the evidence show that might have been raised, and that they were bound to know that that view would be taken; that the view which was taken by the Court at the hearing would be taken of it, and that therefore it is too late for them to come in the present shape, — to come with fresh evidence after the hearing. Therefore these words ought to have been added by his Honour, and would have been added by his Honour in dismissing the bill. And the words "without prejudice" would not have been added, — that his Honour would have refused to add them; and I, putting myself in his Honour's place, do now refuse to add those words in dismissing the bill; dismissing the bill simply without saying "without prejudice to bringing any further suit."

I have decided for the appeal, which was on account of the the omission in his Honour's decree, and the omission is now rectified; his Honour omitted to dismiss the bill simply: they must take back the deposit.

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## ENGLAND.

(COURT OF EXCHEQUER.)

FRANCIS MORGAN, sole Executor of  
the will of JOHN MORGAN, de- } *Appellant;*  
ceased - - - - - }

HERBERT EVANS, Heir at Law of  
Sir WATKIN LEWES, Knight, de- }  
ceased; and JOHN JENKINS and } *Respondents.*  
PHILIP HURD, Administrators of  
the Goods of the said Sir WATKIN  
LEWES - - - - - }

Upon a bill filed by L. against M., his solicitor, for a general account and taxation of his bills of costs, and a decree directing the examination of the parties upon oath, M. filed interrogatories for the examination of L., which he refused to answer; and thereupon an affidavit was filed by M. under an order of Court, verifying the allegations of facts suggested in his interrogatories: Held, under the circumstances, that this affidavit ought to be considered as evidence of the debt, and of the advances of money constituting the debt by M. to L.

A debt of 2400*l.* having been found due by the Master's report, to which no objections or exceptions were taken, and no error appearing upon the face of the report: Held, that this report could not, by order made upon further directions, be reviewed.

M. having obtained judgments against L. upon warrants of attorney which carried interest, and having been in possession and receipt of the rents of lands belonging to L., upon which he was by decree made accountable, with interest: Held, that the judgments ought to carry interest.

Upon appeal and cross appeal, the House of Lords being of opinion that the Appellant in the original appeal, as mortgagee, ought to have obtained the decree with costs in the Court below, gave him costs in the cross appeal upon the principle of indemnity.

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IN 1783 a bill \* was filed in the Court of Exchequer by Sir Watkin Lewes against John Morgan and others, stating various mortgage transactions, and that a great intimacy and friendship had for several years subsisted between the Plaintiff and John Morgan; that the Plaintiff was used to employ him as his attorney and solicitor in all or most of his concerns and affairs, and particularly in and about the settling and preparing the several mortgage deeds and securities therein-before in part set forth, and esteemed him to be a man of honour and integrity; and therefore placed so entire a trust and reliance in him, that the Plaintiff readily signed and executed any deed or writing which John Morgan brought to the Plaintiff to be executed without minutely or at all examining the contents of such deeds or instruments; and that under such faith and confidence the Plaintiff signed and executed the several mortgage deeds and securities therein-before mentioned, without examining or considering the contents thereof.

The bill further stated, that the several sums of 6610*l.*, 1390*l.*, and 4000*l.*, making together 12,000*l.*, mentioned to be the respective considerations of the several indentures, were not in fact really and *bonâ fide* advanced and paid; but some small sums only on account thereof were paid and applied for the use of the Plaintiff at the times of the execution and dates of the respective securities; and particularly the Plaintiff Sir Watkin Lewes charged that when the mortgage of the 3d of June, 1775, for 6610*l.* bore date, although

\* For a more detailed account of the facts and proceedings in this case, see the several reports in 3 Anstr. 769.; 5 Price, 42.; 4 Dow. 30.; 3 Yo. & J. 394.



the Plaintiff was made to give a receipt for 6610*l.* with interest from that day as if then received, the Plaintiff in fact only received 800*l.* on account, which was not paid in cash, but was alleged to be in discharge of a bond of the Plaintiff given for that sum, but which bond had not been delivered up; and the Plaintiff afterwards only received other small sums, which John Morgan advanced from time to time, but kept the bulk of the amount thereof in his own hands, on pretence that he was to pay considerable sums on account of his bills of charges, and for other monies which he pretended he was to pay for the Plaintiff. The Plaintiff charged that the greatest part of the pretended consideration of 6610*l.* was not really lent and advanced, but was composed and made up of bonds, notes, and other securities, before given by the Plaintiff, and of some other sums before charged to the Plaintiff on some other occasions, and in some other different manner and shares, the particulars whereof John Morgan had never disclosed or set forth.

The Plaintiff also charged that the 1390*l.* was not in reality paid or advanced to the Plaintiff; but great part of it was kept in the hands of John Morgan, who notwithstanding charged the Plaintiff with interest for the whole of the said sums, as if they had been actually, really, and *bonâ fide* advanced on the days of the dates of the respective securities; and that John Morgan at the same time kept back the bonds, notes, and other former securities given by the Plaintiff, notwithstanding the same were consolidated in or pretended to be satisfied by such mortgages as aforesaid; or otherwise the Plaintiff charged, that if the said several

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sums, or any of them, were really advanced and paid, the same or any part thereof was not applied or disposed of for the purposes or on the trusts for which the same were raised, and originally intended and directed by the Plaintiff to have been applied.

The bill prayed an account of all dealings and transactions between the Plaintiff and the Defendants, and in particular between the Plaintiff and John Morgan; and that an account might be also taken of what was really and *bonâ fide* due to the Defendants respectively on account of the matters aforesaid, either in their own rights or otherwise; and that an account might be also taken of the rents and profits of the Plaintiff's estates, received by the Defendants; and that John Morgan might be compelled to make out and deliver to the Plaintiff proper bills of his fees and disbursements claimed to be due to him from the Plaintiff; and that the same might be referred to the proper officers to be taxed, the Plaintiff thereby offering to pay or allow to John Morgan what on such taxation should be found due to him; and that on payment by the Plaintiff to the Defendants respectively of what should be found due to them on the taking of such several accounts, and which the Plaintiff thereby offered to do, the Plaintiff might be let in to a redemption of the estates, and might be restored to the possession thereof.

On the 19th of May, 1784, John Morgan put in his answer, by which he denied all the charges of the bill.

The cause was heard on the 2d of July, 1796. By the decree it was referred to the Deputy Remembrancer to take an account of all dealings and trans-

actions between the Plaintiff and the Defendant John Morgan, and also to take an account of all and every sum and sums of money received by the Defendant John Morgan, as agent to the Plaintiff, and also to the Defendants the mortgagees, and when and how such sum and sums of money was or were paid or applied to their account respectively; to tax the several bills of costs claimed to be due to the Defendant John Morgan from the Plaintiff, as his attorney, solicitor, or otherwise, and to report to the Court what he should find due from the Plaintiff to the Defendant John Morgan on account thereof; to take an account of the rents and profits of the mortgaged estates, and of the timber which had been felled thereon, and on the estates not in mortgage, received by the Defendant John Morgan, &c.; and also take an account of the rents and profits of the Plaintiff's estates not in mortgage, and of which the Defendant John Morgan then or at any time or times theretofore had been in possession under the several executions in the pleadings mentioned, or otherwise received by him, &c. In the taking of all which said several accounts therein-before directed to be taken, and in taxing of which said several bills of costs, the said Deputy Remembrancer was to make to all parties all just allowances; and all parties were to be examined upon interrogatories touching the said several accounts, and also touching the said several bills of costs, as the said Deputy Remembrancer should direct.

Under this decree interrogatories were exhibited by the Plaintiff for the examination of the Defendant John Morgan; and the examination was

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filed in November, 1799, but the Plaintiff took no other steps to prosecute the decree.

On the 20th of June, 1801, upon motion made on behalf of the Plaintiff Sir Watkin Lewes, opposed by the Defendant John Morgan, it was ordered that the Deputy Remembrancer might be at liberty to make a separate report of all dealings and transactions between the Plaintiff and the Defendant John Morgan, so far as related to the monies actually received and paid on account of the mortgages and judgments in the bill mentioned; and also of all and every sum and sums of money received by the Defendant John Morgan as agent to the Plaintiff, and also to the Defendants, the mortgagees, and when and how such sum and sums of money was or were applied to their account respectively, and of the rents and profits of the mortgaged estates in the pleadings of this cause mentioned, and of the timber which had been felled thereon, and on the estates not in mortgage, received by the Defendant John Morgan, &c.; and also of the rents and profits of the Plaintiff's estates not in mortgage, and of which the Defendant John Morgan was or at any time or times theretofore had been in possession under the several executions in the pleadings of this cause mentioned, or otherwise received by him, &c.; and that the same should be made without prejudice to any other of the accounts directed by the decree, and particularly as to so much thereof as directed the Deputy Remembrancer to inquire as to the rents and profits and monies which without the wilful default of the Defendant John Morgan might have been received.

Under this order the Deputy Remembrancer made a separate report, dated 16th of July, 1802. To this report the Plaintiff took ten exceptions, which were overruled by the Court of Exchequer by an order dated the 9th of February, 1804.

From this order the Plaintiff Sir Watkin Lewes appealed to the House of Lords, so far as it overruled the 1st, 2d, 3d, 4th, 5th, 6th, and 10th exceptions.

Upon the hearing of that appeal on the 20th of February, 1807, it was ordered, that the order of the 9th of February, 1804, overruling the exceptions, should be reversed; and further as to the first exception, that it should be referred back to the Deputy Remembrancer to inquire and certify what sums were advanced by the Respondent John Morgan to the Appellant Sir Watkin Lewes, as the considerations of the bonds consolidated by the bond of the 28th of February, 1775, for 2400*l.*; and when such sums were paid, and by whom, and to whom, and in what manner.

Under this order the Deputy Remembrancer, on the 10th of May, 1808, made his second separate report, whereby, with respect to the inquiry as to what sums of money were really advanced by John Morgan to Sir Watkin Lewes, as and for the considerations of the several bonds alleged by John Morgan to have been executed by Sir Watkin Lewes to Chardin Morgan, and alleged to have been consolidated by the bond of the 28th of February, 1775, to Chardin Morgan, for securing 2400*l.* and interest, and when such sums were severally and respectively advanced and paid, and by whom, and to whom, and in what manner, he found that the several sums of money mentio*q*ued

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in the first schedule thereto annexed were really advanced by John Morgan, or through his hands, to or for the use of Sir Watkin Lewes, in part of the consideration of such several bonds, in which schedule he had stated the times when such sums were severally and respectively advanced and paid, and by whom, and to whom, and in what manner; and he found that over and above the amounts of the principal monies secured by the several bonds alleged to have been consolidated by the said bond for 2400*l.*, the consideration of that bond consisted of the sums of money, which he found to have been really advanced and paid by John Morgan, or through his hands, to or for the use of Sir Watkin Lewes, at the times and in the manner stated in the schedules.

To this report the Plaintiff took exceptions.

First. For that the Deputy Remembrancer ought not to have certified that the several sums of money mentioned in the first schedule were advanced by, or through the hands of the Defendant John Morgan, in part of the consideration of the several bonds consolidated by the bond for 2400*l.*, but ought to have certified that it did not appear to him that any money was ever advanced by John Morgan to him the said Sir Watkin Lewes, as or for the considerations of such bonds, &c.

Upon the argument of these exceptions the Court made an order, bearing date the 20th of December, 1808, by which it was referred back to the Deputy Remembrancer to review his report as to the matter of the first and second exceptions taken thereto; and that the said Deputy Remembrancer should particularly inquire and certify to the Court what sum or sums of money were really advanced by the

Defendant John Morgan to the Plaintiff Sir Watkin Lewes out of his own proper monies as and for the consideration of the several bonds alleged by the Defendant John Morgan to have been executed by the Plaintiff Sir Watkin Lewes to Chardin Morgan, and alleged to have been consolidated by the bond of the 28th of February, 1775, for securing 2400*l.* and interest, and when such sums were severally and respectively advanced and paid, and by whom, and to whom, and in what manner; and that the said Deputy Remembrancer should state to the Court the evidence of such advancements, and the occasion thereof, and all the circumstances attending thereon, &c.

The Deputy Remembrancer made his third separate report, dated the 13th of June, 1809, by which he found that John Morgan did not advance to the Plaintiff Sir Watkin Lewes, out of his own proper money, any sum or sums as and for the consideration of a bond for 500*l.* (the same being one of the bonds alleged to have been consolidated by the said alleged bond for 2400*l.*); but that the sum of 500*l.* was advanced to the said Plaintiff by Chardin Morgan, through the hands of the Defendant John Morgan, as and for the consideration of the bond. And he found, from the evidence laid before him by the Defendant John Morgan, and mentioned in that behalf in the first schedule thereto annexed, that the said 500*l.* was so advanced on the 31st of January, 1774, the day of the date of the said bond, in one gross sum. And he further certified, that he found that the Defendant John Morgan did advance the several sums of money mentioned in the second schedule thereto annexed, amounting in all to the sum of 1141*l.* 16*s.*, to the

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Plaintiff Sir Watkin Lewes, out of his own proper monies, as and for the considerations, *pro tanto*, of the several bonds in his said former report, and thereafter mentioned, being the others of the bonds alleged to have been consolidated by the said bond for 2400*l*.

To this report the Plaintiff took exceptions.

First. For that the Deputy Remembrancer ought to have certified that no evidence had been laid before him to show that any sum of money had been advanced by the said John Morgan to the said Sir Watkin Lewes out of his own proper money, as the consideration of the said bond of 500*l*.

Second. For that there was no evidence before the Deputy Remembrancer of the advancement of the several sums mentioned in the said second schedule on account of the said bonds; and even supposing them to have been advanced, they appeared to have been advanced by the said John Morgan upon a general account with the said Plaintiff; and the Deputy Remembrancer ought to have certified that no evidence had been produced before him to show that any money had been advanced by the said Defendant John Morgan to the said Plaintiff out of his own proper money as and for the consideration of those bonds.

Third. For that the Deputy Remembrancer ought not to have made any report as to the several sums of 112*l*. 10*s*. and 61*l*. 4*s*., there not being any direction so to do; and there was no evidence before him that the said sums were advanced as part of the consideration of the said bond for 2400*l*; and the said sums, even supposing them to have been advanced, were advanced on a general account with the said Plaintiff, and therefore ought



not to form any of the particular account directed by the said order of the 20th of June, 1801, which was confined to such monies only as related to the mortgages and judgments, or were received by the said Defendant John Morgan as agent to the said Plaintiff and the mortgagees, &c.

Upon argument of these exceptions the Court of Exchequer, on the 24th of May, 1810, made the following order and decree.

It was ordered and decreed by the Court, that the first exception taken by the said Plaintiff to the said report (so far as the same report stated the advance of the sum of 500*l.* to the said Plaintiff by the said Chardin Morgan) should be allowed. And it was further ordered, that it should be referred back to the said Deputy Remembrancer to review his said report in respect to the other part of the said first exception; and that he should state to the Court all the evidence adduced and read before him as to what money was advanced by the Defendant John Morgan to the said Plaintiff, as and for the consideration of the bond for 500*l.* in that exception also mentioned, and when such money was advanced and paid, and by whom, and to whom, and in what manner the same was paid. And it was further ordered, that it should be referred back to the said Deputy Remembrancer to review his said last-mentioned report as to the matter of the second exception taken by the said Plaintiff thereto, and that he should state to the Court in like manner all the evidence adduced and read before him as to what monies were advanced by the said Defendant John Morgan, as and for the considerations for the said several bonds for 220*l.*, 120*l.*, 950*l.*, and 400*l.*, respectively men-

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tioned in the said second exception, and when, and by whom, and to whom, and in what manner the same were advanced and paid. And it was further ordered and decreed, that it should be also referred back to the said Deputy Remembrancer to review his said report as to the subject matter of the third exception taken by the said Plaintiff thereto. And it was also ordered, that it should be referred back to the said Deputy Remembrancer to review his said report as to the matter of the fourth exception taken by the said Plaintiff thereto, according to the direction therein given on the reference back to him of the first exception. And as to the fifth exception taken by the said Plaintiff to the said Deputy Remembrancer's report, it was ordered and decreed that the said exception should be overruled; and with respect to the sixth and seventh exceptions taken by the said Plaintiff to the said report, it was further ordered and decreed that it should be referred back to the said Deputy Remembrancer to review his said report as to the matter of the said exceptions, so far as the same should be necessary upon reviewing his said report in regard to the reference back to him of the other exceptions.

On the 11th of July, 1810, an order was made on motion on behalf of the Plaintiff Sir Watkin Lewes, and consented to on behalf of the Defendants, whereby it was ordered, that it should be referred to the Deputy Remembrancer to take an account and make a separate report of the principal and interest due to the Defendants, or claimed to be due to them, or any or either of them, upon the securities in that cause mentioned and otherwise, together with the costs directed by the decree made

on the hearing to be taxed, with legal interest from the filing of the bill in the year 1783, deducting thereout and giving credit for the rents and profits of the estates in the pleadings mentioned, and other monies received by the Defendants, or any or either of them, or by any person or persons on their account, for the complainant's use; and in taking the said accounts the said Deputy Remembrancer was to make the usual half-yearly rests, and apply the overplus thereof, if any, after keeping down the interest of all the said monies, in reduction of the principal monies; and that upon payment by the said complainant to the said Defendants of what should be found due from him upon taking such accounts, together with the Defendants' costs in the cause, the Defendants should deliver up possession and execute a proper reconveyance of the estates in question in that cause to the complainant, together with all title-deeds, evidences, and writings relating thereto; and that the said report should be without prejudice to any questions in the cause.

On the 25th of June, 1811, the Deputy Remembrancer made his fourth separate report under the order or decree of the 24th of May, 1810, whereby, among other things, he found, and stated the evidence for finding, that the bond for 2400*l.* was part of the 6610*l.* consideration for a mortgage executed by Sir Watkin Lewes.

To this report the Plaintiff took exceptions.

On the 5th of July, 1813, the Court made an order on these exceptions, from which the Defendants, John Morgan, &c., appealed to the House of Lords.

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Upon the hearing of that appeal on the 8th of April, 1816, the order of the 5th of July, 1813, was partly affirmed and partly reversed.

On the 1st of February, 1817, the Deputy Remembrancer made his fifth separate report, to which exceptions were taken.

These exceptions were overruled by the Court of Exchequer by an order dated 8th of November, 1817, and the report was confirmed.

By an order of the Court, dated 17th November, 1817, made on the motion of the Plaintiff Sir Watkin Lewes, the Defendant John Morgan was restrained from receiving any further rents of the estates, and ordered to bring into Court, in trust, to abide the further order of the Court, the sum of 4993*l.* 10*s.* 10½*d.*, being the amount of the balance by the said Deputy Remembrancer's report, dated 1st of February, 1817, reported to be in his hands in respect of the rents and profits of the estates received by him.

By another order of the Court, dated 27th of November, 1817, a reference was made to the Deputy Remembrancer to take an account of the rents and profits of the said estates received by Francis Morgan, James Morgan, Joan Wilder, and John Morgan, from the 26th of March, 1806, and to compute interest at 5*l.* per cent. per annum on the said sum of 4993*l.* 10*s.* 10½*d.*, from the 6th of June, 1810, to the time when the same should be paid into Court, &c.

From these several orders of the 8th, the 17th, and the 27th November, 1817, the Defendants John Morgan and George Morgan appealed to the House of Lords.

In the mean time John Morgan had been taking steps to prosecute the original decree of the 2d of July, 1796. In November, 1816, he carried a state of facts under the said decree into the office of the Deputy Remembrancer, and exhibited interrogatories for the examination of the Plaintiff Sir Watkin Lewes, which were allowed by the Deputy Remembrancer on the 25th of February, 1818.

The Plaintiff refusing to put in any examination in answer to the interrogatories, the usual processes of contempt were issued against him, but no examination was put in; and on the 25th of June, 1818, an order was made by the Court of Exchequer that the Plaintiff should show cause why the state of facts of John Morgan should not be taken as confessed by the said Plaintiff. On the 13th of November, 1818, the Court made another order, whereby the order of the 25th of June was discharged; and it was ordered that in case the Plaintiff should make default in filing his examination to the interrogatories exhibited by the Defendant John Morgan before the Deputy Remembrancer for his examination, by the first day of the then next Hilary Term, John Morgan should be at liberty to make an affidavit of the several facts to which the interrogatories so exhibited by him for the said Plaintiff's examination were intended to apply, which affidavit the Deputy Remembrancer was then to take into his consideration, and proceed in the accounts and inquiries before him under the decree in the cause.

The Plaintiff did not put in any examination; and on the 12th of February, 1819, the Defendant John Morgan filed his affidavit in pursuance of the order of 13th of November, 1818.

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On the 27th of February, 1819, the Plaintiff Sir Watkin Lewes by motion applied to the Court of Exchequer that a certain order of the 25th of April, 1818, and the order of the 13th of November, 1818, might be rescinded; and that the Defendant John Morgan might be ordered, on or before the 10th of March then next, to pay into Court in trust in the cause the two sums of 4000*l.* and 4993*l.* 10*s.* 10*d.*, making together the sum of 8993*l.* 10*s.* 10*d.*, subject to the further order of the Court; and that the order of the 13th of November then last might be rescinded, and the Plaintiff Sir Watkin Lewes might be at liberty to put in such examination as he should be advised was proper and material to be filed to the Defendant John Morgan's interrogatories exhibited before the Deputy Remembrancer; or in case the Court should be of opinion that the order of the 13th of November then last ought not to be rescinded, then that the Defendant John Morgan might be restrained from proceeding before the Deputy Remembrancer upon such parts of his interrogatories so exhibited for the examination of the Plaintiff as comprised any of the items contained in the Deputy Remembrancer's former reports made in the cause, and disposed of and disallowed by the orders of the Court and the judgment of the House of Lords; and that the Deputy Remembrancer might be ordered to strike out from the said interrogatories, and from the Defendant John Morgan's affidavit made in support thereof, all such items or matters of account as aforesaid, and not to report on the same; and that the Plaintiff, being a prisoner in his Majesty's prison of the Fleet for debt, might be at liberty to attend in person, or by such agent

as he should appoint to be heard and to attend the Deputy Remembrancer, on or prior to the making such report, and on all his proceedings thereon; and that all the Plaintiff's title-deeds, then in the office of the Deputy Remembrancer or in the hands of the Defendant John Morgan, might be delivered up to the Plaintiff. This motion was refused with costs.

On the 28th of February, 1818, an order was made upon motion on behalf of the Defendant John Morgan, and on hearing counsel for the Plaintiff and for the other Defendants, in consequence of the order of November, 1817, restraining him from receipt of the rents, that it should be referred to the Deputy Remembrancer to appoint a proper person to be receiver of the rents of the mortgaged premises; and that such receiver out of such rents should pay any arrears of interest then due on the mortgage for 4000*l.*, and also pay and keep down the accruing interest of the same.

All these proceedings were stated by the Defendants John Morgan and George Morgan in a supplemental case laid on the table of the House of Lords in their appeal.

Before any order was pronounced by the Lords upon the last-mentioned appeal, the Plaintiff Sir Watkin Lewes, and the Defendants John Morgan and George Morgan, and other parties to the suit, died; and by bills of revivor the suit was revived by the Appellant Francis Morgan, as executor of John Morgan, against the Respondent Herbert Evans, as the heir at law of the Plaintiff Sir Watkin Lewes, and against the Respondents John Jenkins and Philip Hurd as his administrators, and against the other necessary parties; the appeal was also

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revived; and on the 5th of July, 1825, the House of Lords made an order on the appeals, by which it was ordered and adjudged, that the order of the 8th of November, 1817, upon the exceptions, should be affirmed; and that the orders of the 18th of November, 1817, and the 27th of November, 1817, should be reversed; and that the Court of Exchequer should proceed in the cause according to the decree of the 2d of July, 1796, and the subsequent order of the 11th of July, 1810, made upon motion on behalf of Sir Watkin Lewes, and consented to by John Morgan and the mortgagees.

The Master made his general report, dated 11th of December, 1826, by which among other things he found that John Morgan, from the year 1774 to the year 1778, both inclusive, was employed as an attorney, solicitor, and agent to Sir Watkin Lewes; and that John Morgan received, or charged himself as agent to Sir Watkin Lewes with the several principal sums secured by the respective mortgages in the pleadings in this cause mentioned, making together 13,000*l.*, on the several days on which the said several mortgages are respectively dated; and that John Morgan paid or applied to the account of Sir Watkin Lewes the whole of the said sum of 13,000*l.*, at the times and in manner set forth in the first schedule thereto annexed; and that John Morgan also received, as agent to Sir Watkin Lewes, the several other sums of money set forth in the second schedule thereto, amounting together to 1340*l.* 4*s.*, at the several times in the said schedule set forth, and paid or applied the same to the account of Sir Watkin Lewes at the times and in manner set forth in the third schedule thereto. That in Trinity Term, 1778,



John Morgan recovered a judgment in the Court of King's Bench against Sir Watkin Lewes for the sum of 1142*l.*, which was composed of the several sums set forth in the fourth schedule thereto. And that in Easter Term, 1779, John Morgan recovered another judgment in the Court of King's Bench against Sir Watkin Lewes, for the further sum of 569*l.*, claimed by him to be due from Sir Watkin Lewes for bills of costs. The Master then by his report, after finding the amount of bills of costs, and stating various computations, found that the principal monies due from the said Sir Watkin Lewes to the said John Morgan, on account of the matters aforesaid, made together the sum of 3613*l.* 1*s.* 10*d.* He then stated the amount of rents and profits, and timber felled, received by John Morgan from the estates of Sir Watkin Lewes; and reciting, that it being directed by the order of the 11th of July, 1810, that an account should be taken of the principal and interest due to the defendants, or claimed to be due to them, upon the securities in the cause mentioned and otherwise, together with the costs directed by the said decree to be taxed, with legal interest from the filing of the original bill in the year 1783, deducting thereout and giving credit for the rents and profits of the estates in the pleadings of this cause mentioned, and other monies received by them or any or either of them, or by any person or persons on their account, for the use of Sir Watkin Lewes; and that in taking the said account he should make the usual half-yearly rests, and apply the surplus thereof, if any, after keeping down the interest of all the said monies in reduction of the principal monies, he found that the prin-

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principal monies due on the securities in the pleadings mentioned, and the said costs, consisted of the particulars therein set forth; which made together 17,053*l.* 18*s.* 5*d.* That he had proceeded to compute interest on the said mortgage monies and costs. But he further certified, that, in taking the aforesaid accounts, he had not allowed the representatives of Chardin Morgan and John Morgan any interest on the said judgments.

In the first schedule referred to by the foregoing report, containing the particulars of 13,000*l.*, paid or applied to the account of Sir Watkin Lewes by John Morgan, the first item was as follows:—

1775. June 2. Paid bond, dated 28th of February last, from Sir Watkin Lewes to Chardin Morgan, which was assigned to William Farrer, Esq. and the Rev. James Morgan, for the principal sum of - - £2400 0 0

To this report the Appellant Francis Morgan took two exceptions, which were,

First. For that the said Master had, in and by his said report, computed interest on the mortgage monies and costs therein mentioned, and applied the overplus of the rents and profits therein mentioned, after keeping down such interest in reduction of the principal monies due on all the securities in the pleadings mentioned, comprising the several judgments as well as the said mortgages and costs; whereas the said Master ought not so to have done, but ought to have computed interest on the principal monies due upon the said several judgments, as well as upon the said mortgages and costs, and applied the overplus only of the said rents and profits, after keeping down the interest of all the

said principal monies, in reduction of the said principal monies.

Second. For that the said Master had in and by his said report certified, that in taking the said accounts he had not allowed to the representatives of Chardin Morgan therein named, and John Morgan, any interest on the aforesaid judgments; whereas the said Master ought to have allowed interest on all the said judgments, and to have certified that he had allowed the same in and by his said report, and to have stated the accounts in his said report and the tenth schedule thereto mentioned, and set forth accordingly.

These exceptions were, by an order dated 4th of February, 1827, overruled, with costs.

No other party took any exception to the general report; and the cause being set down for hearing for further directions, was heard on the 3d of May, 1827, when the Lord Chief Baron ordered and decreed that it should be referred back to the Master to review his report, bearing date the 11th of December, 1826, having regard to the first exception taken by the late defendants, George Morgan and John Morgan, to the fifth separate report made in the cause by the Deputy Remembrancer, bearing date the 1st of February, 1817, and also having regard to the order of the Court, made on the 8th of November, 1817, whereby the exception was overruled and the report confirmed; and also having regard to the order of the House of Lords, bearing date the 5th of July, 1825; and that the Master should inquire and ascertain, and report to the Court how far and in what respects those proceedings ought to vary the ba-

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lance stated by him in his report of the 11th of December, 1826; and if the Master should find that such proceedings ought to vary the same, it was further ordered that he should correct such balance accordingly. And it was further ordered, that it should be referred to the said Master to tax the defendants, Francis Morgan and James Morgan, their costs of the inquiry therein before directed; and that such costs, when taxed, should be paid to the said defendants or their clerk in Court by the defendant Herbert Evans.

On the 10th of December, 1828, the Master made his report, and thereby certified that, having regard to the said exception and orders, he found, as to the bond for 2400*l.* mentioned in his former report, that the validity of such bond being questioned, and the allowance of such two last-mentioned sums being then objected to without sufficient evidence being shown of the consideration of the said bond, he had, having regard to the said exception and orders, required the defendant Francis Morgan, who, as executor of the late Defendant John Morgan, claimed the benefit of the said bond, to go into and prove before him the consideration thereof; but the said defendant had declined to produce any new evidence of the consideration for the said bond, or to claim any less sum in respect thereof than the said sum of 2431*l.* 19*s.* 5*d.*, relying on his said report, made on the 11th of December, 1826, and the evidence which was then before the said Master, that was to say, an account, dated the 24th of February, 1777, signed by the said Sir Watkin Lewes, and the affidavit of the said John Morgan, sworn on

the 12th of February, 1819; and the said Defendants, Herbert Evans, John Jenkins, and Philip Hurd, having produced before him the separate reports made by the said late Deputy Remembrancer on the 15th of July, 1802, the 10th of May, 1808, the 13th of June, 1809, and the 25th of June, 1811, together with the order of that Court, made on the 5th of July, 1813, and the orders of the House of Lords made on the 8th of April, 1816, and the 5th of July, 1825, he had taken the same into his consideration, as explanatory of the said first exception to the said fifth separate report of the said Deputy Remembrancer, and the said orders of that Court and of the House of Lords, and had thereupon disallowed the said sum of 2431*l.* 19*s.* 5*d.*; but he had allowed to the said Francis Morgan, as such executor, in lieu thereof, several payments appearing by the said separate report of the 23rd of June, 1811, to have been made by the late Defendant John Morgan to and for the use of Sir Watkin Lewes, amounting together to the sum of 1815*l.* 10*s.*, the particulars whereof were set forth in the first schedule to that his report annexed; which payments the said John Morgan had treated as satisfied by the bond for 2400*l.*, and several bonds of the said Sir Watkin Lewes, alleged by him to have been consolidated thereby.

To this report the Appellant Francis Morgan took exceptions: the second of which was because the Master ought not, being not warranted by the said exception and orders, to which he was directed to have regard in reviewing his said former report, to entertain any question of the validity of the bond for 2400*l.*, or any objection then made to the allowance of the said two sums of 2400*l.* and 31*l.* 19*s.* 5*d.*,

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or to require the Defendant Francis Morgan then to go into and prove before the Master the consideration thereof, the bond having been established by the evidence which was before the Master, at the time of his former report, and by the same report, and the allowance of the said two sums not being affected by the exception and orders to which the said Master was directed to have regard in reviewing his former report, or any of them; and the Master not being warranted by the said order, directing him to review his said former report, to take into his consideration the said separate reports of the 16th of July, 1802, the 10th of May, 1808, the 13th of June, 1809, and the 25th of June, 1811, or the said orders of the 5th of July, 1813, and the 8th of April, 1816, or any of them; and none of the said last-mentioned reports and orders, if the said Master was warranted to take the same or any of them into his consideration, affecting his said former report, or the said evidence which was before him at the time of making the same.

Third. For that the said Master, in and by his said report, stated that he had allowed to the said Francis Morgan, as such executor, in lieu of the said 2431*l.* 19*s.* 5*d.* principal and interest due on the said bond, several further payments appearing by the said separate report of the 25th of June, 1811, to have been made by the said late Defendant John Morgan to and for the use of the said Sir Watkin Lewes, amounting together to the sum of 1315*l.* 10*s.*; which payments the said John Morgan had treated as satisfied by the said bond for 2400*l.*, and several bonds of the said Sir Watkin Lewes, alleged by the said John Morgan to have been consolidated thereby whereas the said Master

ought not so to have stated, but ought to have allowed to the said Francis Morgan, as such executor, the whole of the payments charged by him to have been made by the said John Morgan in manner aforesaid, amounting to the sum of 2363*l.* 14*s.*, and to have stated in the said report that he had so allowed the same; the said charge of the said Francis Morgan being fully established by the evidence produced by the said Francis Morgan before the said Master in support thereof, and no other evidence having been produced on the subject thereof before the said Master, except the said separate reports, which the said Master was not authorized to receive or consider as evidence on the subject thereof; and such reports, if received, not contradicting or affecting the evidence produced by the said Francis Morgan.

Fourth. Because the said Master ought to have stated that he found that the last-mentioned exception and orders ought not to vary the balance stated in his said former report.

Fifth. Because the Master ought to have stated that the balance found by his said former report to be then due from the estate of Sir Watkin Lewes, on the securities in his former report mentioned, had been reduced by the sum of 1300*l.*, admitted to have been received since the date of his former report by Francis Morgan and the Defendant James Morgan, as in the report was set forth, and was not otherwise varied.

These exceptions were argued before the Lord Chief Baron; and, by an order dated the 12th of May, 1829, his Lordship overruled the same, with costs.

The cause was heard on further directions before

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the Lord Chief Baron, on the 6th of July, 1829, when it was ordered, adjudged, and decreed, that the Master's report, bearing date the 10th day of December, 1828, should be ratified and confirmed, except as thereafter mentioned. And the Court declared that Francis Morgan, as personal representative of John Morgan deceased, was entitled as against the Plaintiff Sir Watkin Lewes deceased, or his estate, to be allowed in account interest, after the rate of 5*l.* per cent. per annum, from the 28th of February, 1775, being the day of the date of the bond for 2400*l.*, upon the principal sum of 1315*l.* 10*s.*, mentioned in the first schedule to the Master's report, to any amount, not exceeding in the whole, with the said principal sum, the sum of 4800*l.*, the penalty of the said bond. And it was further ordered by the Court, that, in pursuance of the said declaration, it should be referred back to the Master to review his report of the 10th of December, 1828, so far as he had found thereby that, on the 11th of August, 1812, a balance or sum of 127*l.* 10*s.* 2*d.* was due to the estate of Sir Watkin Lewes from the Defendant John Morgan or his estate, by allowing to the Defendant John Morgan, or his representative, interest upon the principal sum of 1315*l.* 10*s.*, after the rate of 5*l.* per cent. per annum, from the 28th of February, 1775, up to the time when the same should have been paid off and satisfied, provided the said principal sum and interest thereupon should not exceed the sum of 4800*l.*, the penalty of the said bond, or until the said principal and interest should amount to the sum of 4800*l.* And it was further ordered by the Court, that in reviewing his said report, and making the variations thereinbefore



directed, the said Master should, after satisfaction of the mortgage debts due from the estate of the said Sir Watkin Lewes, apply the rents of the said mortgaged estates in and towards the payment and satisfaction of the judgments in the pleadings mentioned, before he should apply the same in and towards payment and satisfaction of the said principal sum of 1315*l.* 10*s.* and interest thereon, but without disturbing the application of such rents in and towards the payment of the bills of costs of the said Defendant John Morgan and interest thereon, in the pleadings mentioned, and in the said Master's report already allowed. And it was further ordered by the Court, that it should be referred to the said Master to inquire and report to the Court, having regard to the above directions, when the debt due from the said Plaintiff Sir Watkin Lewes or his estate, to the Defendant John Morgan or his estate, was paid and satisfied, and what, if any, balance was due to the estate of the said Sir Watkin Lewes from the said Defendant John Morgan or his estate, on the day when such debt was paid, &c. And the said Defendant Francis Morgan by his counsel, admitting assets received by him of the personal estate of the said late Defendant John Morgan, sufficient to pay what might be directed by that order to be paid out of the estate of the said John Morgan, it was ordered that the said Defendant Francis Morgan, as executor of the said John Morgan, should pay the said Defendants, Herbert Evans, John Jenkins, and Philip Hurd, their respective costs occasioned by the said controversy. And it was further ordered by the Court, that the said Master should add the amount of the said late Plaintiff Sir Watkin Lewes's, and of

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the said Defendant John Wilder's said costs, relating to the said controversy and amount of the general balance, when so taxed as last aforesaid, to the sum which the said Master should find to be due from the estate of the said Defendant John Morgan, to the estate of the said Plaintiff Sir Watkin Lewes, for principal monies and interest, according to the directions therein-before given. And it was further ordered by the Court, that the said Francis Morgan, as personal representative of the said Defendant John Morgan deceased, should, out of the assets of the said Defendant John Morgan, pay the amount of the said principal monies and interest, and last-mentioned costs, such amount to be certified by the Master, into the Bank of England, in the name and with the privity of the Accountant-General of that Court, in trust in the said cause, the account aforesaid. And it was further ordered by the Court, that the said Francis Morgan, Mary Ann Morgan, Joan Wilder, and all other necessary parties, should, according to their respective estates and interests, reconvey, surrender, assign, and re-assure unto the said Defendant Herbert Evans, the heir at law of the said Plaintiff Sir Watkin Lewes, all and singular the said mortgaged estates and premises, free and clear of and from all incumbrances whatsoever, committed, permitted, or suffered by them or either of them, or by the said John Morgan or James Morgan, Henry Wilder William Farrer, or George Morgan deceased; such conveyances, surrenders, and assignments to be settled by the said Master, in case the parties differed about the same, to whom it was thereby referred to settle the same. And it was further ordered by the Court, that the said Francis Morgan

and all other parties should produce and leave with the said Master, upon oath if required, all deeds, books, papers, and writings, in their or either of their custody or power, relating to the said mortgaged estates and premises, &c.

The Appellant Francis Morgan appealed generally from the orders or decrees of the 4th of February, 1827, the 3d of May, 1827, the 12th of May, 1829, and the 6th of July, 1829.

Herbert Evans also presented his cross appeal to the House of Lords, complaining of so much of the order of the 6th of July, 1829, as declared that Francis Morgan, as personal representative of the Defendant John Morgan deceased, was entitled as against the Plaintiff Sir Watkin Lewes deceased, or his estate, to be allowed in account interest after the rate of 5*l.* per cent. per annum from the 28th day of February, 1775, being the day of the date of the said bond for 2400*l.* upon the principal sum of 1315*l.* 10*s.*, mentioned in the first schedule to the said Master's report, to any amount not exceeding in the whole, with the said principal sum, the sum of 4800*l.*, the penalty of the said bond; and as orders, that in pursuance of the said declaration it should be referred back to the said Master to review his said report of the 10th day of December, 1828, so far as he had found thereby that on the 11th of August, 1812, a balance or sum of 127*l.* 10*s.* 2*d.* was due to the estate of the said Sir Watkin Lewes, from the said Defendant John Morgan or his estate, by allowing to the said Defendant John Morgan or his representative, interest upon the said sum of 1315*l.* 10*s.* after the rate of 5*l.* per cent. per annum from the 28th of February, 1775, up to the time when the same should have

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been paid off and satisfied, provided the said principal sum and interest thereupon should not exceed the sum of 4800*l.*, the penalty of the said bond, or until the said principal and interest should amount to the said sum of 4800*l.*; and as orders that in reviewing his said report, and making the variations therein-before directed, the said Master should, after satisfaction of the mortgage debts due from the estate to the said Sir Watkin Lewes, apply the rents of the said mortgaged estates in and towards the payment and satisfaction of the judgments in the pleadings mentioned, before he should apply the same in and towards the payment and satisfaction of the said principal sum of 1315*l.* 10*s.* and interest thereon, but without disturbing the application of such rents in and towards the payment of the bills of costs of the said Defendant John Morgan, and interest thereon, in the pleadings mentioned, and in the said Master's report already allowed; and as orders that it should be referred to the said Master to inquire and report to the Court, having regard to the above directions, when the debt due from the said Plaintiff Sir Watkin Lewes or his estate, to the said Defendant John Morgan or his estate, was paid and satisfied, and what, if any, balance was due to the estate of the said Sir Watkin Lewes from the said Defendant John Morgan or his estate, on the day when such debt was paid and satisfied; and as orders that the said Master should compute interest after the rate of 4*l.* per cent. per annum upon the balance, if any, which he should find to have been due from the said Defendant John Morgan or his estate, to the said Plaintiff Sir Watkin Lewes or his estate, from the day upon which the Master

should find that the debt due from the said Sir Watkin Lewes or his estate, to the said Defendant John Morgan or his estate, was paid and satisfied; and also upon the monies which from time to time since that day had been received by the said John Morgan or his representatives, or the mortgagees or their representatives, from or out of the estate of the said Sir Watkin Lewes; and as orders that the said Master should add the amount of such interest to the aforesaid balance, if any, and monies from time to time received as last aforesaid, and report to the Court how much remained due for principal monies and interest, from the estate of the said Defendant John Morgan, to the estate of the said Plaintiff Sir Watkin Lewes, upon the footing of the aforesaid declarations and directions.

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For the Appellant, Sir *E. Sugden* and Mr. *Pemberton*.

For the respective Respondents, Mr. *Tinney*, Mr. *West*, Mr. *Knight*, and Mr. *Wigram*.

Upon the question of interest upon the judgment, the following authorities were cited. *Godfrey v. Watson*, 3 Atk. 517.; *Machure v. Dunkin*, 1 East, 436.; *Bann v. Dalzell*, 1 Mo. and Ma. 228.; and *Tunstall v. Trappe*, 3 Sim. 229.

The *Lord Chancellor*. — When the argument in this very long, very important, but very complicated case, was closed at your Lordship's bar, I took occasion to state the views\* with which I was impressed at that time with respect to the most material points in question: those points were principally three in number, upon which I felt

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\* To the same effect as here, but less fully.

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great difficulty in arriving at the same conclusion to which the Court below had come. I stated at some length the grounds upon which I was disposed to differ with the Court of Exchequer; and I added, that though I was not then prepared to recommend to your Lordships to pronounce a final judgment, altering or reversing that decree, yet, for reasons which I then stated, especially with a view to instituting a comparison between the answer of John Morgan and his affidavit in the cause, and with a view of examining how far the question of interest had been well dealt with in the Court below, and, finally, with a view of considering the very important question of practice in the courts of equity raised by the course which the Court below had taken, of referring back to the Master to review a report to which no objections were made before the Master, and against which no exceptions were taken before the Court; that, with a view chiefly to consider those matters, and also with a view of protecting ourselves, by further examination of the case, from being led into error, by the extraordinary complication of the case, I advised your Lordships to delay the further proceedings in the cause. I have now availed myself of the opportunity which this postponement has afforded for further examination; and I am prepared to state to your Lordships the result of the attention which I have been enabled to pay again to the question; that result is, that all the difficulties which I before had in coming to the conclusion at which the Court of Exchequer had arrived, remain unabated and insuperable; and that I am rather more, than less, prepared to express an opinion contrary to the

judgment below than I was when I last addressed your Lordships.

If, on the one hand, it is matter of anxious desire that there should be a coincidence of opinion in the courts, and if I naturally felt a great reluctance in being called upon to advise a reversal to so large an extent as I am about to propose of the judgment of the Court below, it is at the same time, on the other hand, a great consolation to my mind that, in the first place, I have with me, I think, in some degree, the authority of opinions expressed in your Lordships' house, when the case was formerly here; and, in the next place, that I have with me, on a most material point, the opinion of one of the most accurate and most learned, as well as intelligent judges, in one important stage of the business in the Court below: I mean the late Mr. Baron Wood. But further, I do not hesitate to say, that one or two of the matters involved in this decree are so extremely clear, and the error which has prevailed below is to my apprehension so manifest, that I feel far less reluctance than I might otherwise labour under, in recommending to your Lordships the course which I feel it my duty to propose. I beg here to refer your Lordships to what I said when the case was last before the House, at the close of the argument, so as to dispense with the necessity of again going over the same grounds. The opinion which I then stated remains entirely confirmed by further consideration; and I shall now briefly advert to the several principal parts of the case.

At all events, we must feel very great satisfaction that we are at length approaching the end of this long litigation. Before most of us were born the

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cause was in Court: it is considerably, I believe, upwards of half a century, since the bill was filed. There have been six or seven stages in the Court below, which have led to as many renewals of procedure in different shapes. In three or four of those stages there has been reference made to this House as a court of appeal; decisions on those appeals have been pronounced by your Lordships; and these have led immediately to new litigation. In 1801, by a most unfortunate step made by the Court below (with which the present Appellant is no way chargeable, for he resisted it), an entire departure was effected from the course which had been taken in the same cause some five years before: I mean in 1796. The result of that has been to involve the whole cause, for three and thirty years past, in a degree of inconsistency, obscurity, and complexity, which I do not think I exaggerate at all when I pronounce to be without precedent or parallel.

As to the effect of Mr. John Morgan's affidavit, which is a most important branch of the case, I remain of the opinion which I before expressed. A question here arises, extending generally to two sums of 1089*l.* and 500*l.*, and also to others, including parcel of a larger sum of 2400*l.*, formed of consolidated items, said to be composed of the amount of the monies due from Sir Watkin Lewes to Mr. Morgan, his solicitor, as having been advanced by him in money, or in money's worth and which originally having consisted of different minor sums, were consolidated ultimately into one, that being a bond for 2400*l.* I agree entirely with that which Mr. Baron Wood has in his able judgment (reported in the fifth volume of Price) admitted,



and which no one can doubt, that when a person claiming to be a creditor of another stood at the time when the money was said to have been advanced in the relation of solicitor or attorney to the borrower as his client, it would not be sufficient for him, in order thoroughly to substantiate his claim against his client, merely to produce the instruments and securities, even supposing the security to be a bond: he must go further. Now the question here, and the main question, is whether, taking the whole facts of the case together, Mr. John Morgan has not gone further, and whether he has not gone sufficiently far to have justified the Master in coming to the conclusion to which he came in the first report; the report made the subject of exceptions at the time when the decree was pronounced,—I mean the decree of the 6th of July, 1829? I agree with the affirmative of that proposition. I hold that the affidavit of John Morgan is not only admissible (for it was admitted, and it is not denied to have been gone into), but I am further of opinion, that whether we take the circumstances in which it was made; whether we consider the position in which Sir Watkin Lewes had voluntarily placed himself; whether we consider his refusal to avail himself of the opportunity given him of telling his own story on oath, or go back to the order under which that affidavit was let in (the order, I mean, of the 13th of November, 1818);—or whether we go back the whole length of the proceeding, and consider the manner in which Sir Watkin had proceeded, and the manner in which he had failed, even to attempt to offer evidence in support of the allegations of the bill:—that in all those views, and upon all

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those grounds it was not only competent to the Master to take into his account the affidavit of Mr. John Morgan, which it is not denied was admitted by force of the order I have last adverted to, but that he was bound to give it great weight; that it was not only admissible, but entitled to the greatest credit; and I think I shall demonstrate to your Lordships, that it was in the circumstances, all but conclusive of that which John Morgan swears to.

First, a bill was filed against Mr. Morgan; charge upon charge was heaped upon him in that bill, till the cup might be said to overflow: there was hardly a security he had that was not impeached; there was hardly a fraud that could be committed which he was not charged with; there was hardly an accusation that could be made which was not urged against him; and, among other things, many transactions were impeached which now stand undisputed, and the decree establishing which is not appealed against; but I dwell not much upon this topic, though it carries me one step towards my conclusion.

To support a bill so framed, seeking to cut down the securities of a creditor, and reflecting materially on the character and conduct of a professional man, not a tittle of evidence was adduced by the Plaintiff; nay, not even an attempt was made to establish such a case; while the answer of Mr. Morgan more or less strenuously denied the charges, and set up his own case. Then comes the affidavit of Mr. Morgan. How does that get into Court? It is easy to say that a man's own oath shall not avail him; that a man shall not decide the cause by his own affidavit, made on his own

behalf. It is easy to say a party is no witness for himself. True; but at all events there is the oath of Mr. Morgan against the unsworn allegation of Sir Watkin Lewes in his bill. But, moreover, admitting Mr. Morgan to be a solicitor, and to have acted as a solicitor of the Plaintiff; admitting that he is liable to the rules governing solicitors in their dealings with their clients, and that the bare production of that which would be sufficient ground for a judgment in other cases, namely, the instrument constituting his security, is not here sufficient; admitting both the fact and the doctrine, let us look at the peculiar nature of this affidavit, and the circumstances in which it was allowed to be made use of.

The order to which I have adverted of the 13th of November, 1818, is a substitute for an order *nisi* of the 25th of June, 1818, calling upon Sir Watkin Lewes to shew cause why the state of facts of John Morgan should not be taken as confessed by Sir Watkin Lewes. The reason which induced the Court to make that order of the 25th of June, 1818, was that there was no possibility of getting Sir Watkin Lewes to answer the interrogatories which had been filed. Mr. Morgan had exhibited his interrogatories in the accustomed manner of the Court, but no power on earth could extract an answer from Sir Watkin Lewes. At that time his principal residence was in one or other of the prisons, and he was generally brought up to the hearing of the cause in the custody of an officer of the Court. When the Court found that they could not attain that which Mr. Morgan was entitled to, namely, the examination of the Plaintiff on oath, they were then induced to make the order of June,

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1818, calling upon him to shew cause why the statement of Mr. Morgan should not be taken *pro confesso* ; this was found to be irregular : it was an order which the Court found, on further consideration, it could not abide by, and being an order *nisi*, on cause being shewn it was discharged ; but discharged for the purpose of substituting the order of the 13th of November in its place ; and now let us attend to that order, for it is a most material step in the cause. After discharging the order of the 25th of June, “ it is ordered that in case the “ said Plaintiff should make default in filing his examination to the interrogatories exhibited by the “ said Defendant John Morgan before the Deputy “ Remembrancer, for his examination, by the first “ day of the then next Hilary term,”— giving him, your Lordships perceive, somewhere above two months, from the 13th of November to the 23d of January, about two months and ten days after all the defaults he had already committed — “ in case “ the said Plaintiff should make default in filing his “ examination to the interrogatories exhibited by “ the said Defendant John Morgan, before the “ Deputy Remembrancer, for his examination, by “ the first day of the then next Hilary term, the “ said John Morgan should be at liberty to make “ an affidavit of the several facts to which the “ said interrogatories so exhibited by him for the “ said Plaintiff’s examination were intended to “ apply, which affidavit the said Deputy Remembrancer was then to take into his consideration.” This order therefore gave the Defendant leave to make his own statement, on oath, of his own case, and the Deputy Remembrancer was to take that affidavit into his consideration in the further pro-

ceedings in the cause, provided Sir Watkin Lewes contumaciously persevered in refusing to answer the interrogatories which Mr. Morgan had filed against him.

The Chief Baron, in his judgment below, relied, I think, too much upon the consideration that this affidavit of Mr. Morgan was only to be receivable in evidence, and was not ordered to be binding upon the Remembrancer: I entirely agree in that opinion. But though the exigency of the order did not require it should be binding upon the Remembrancer, I am about to shew that the circumstances in which the order was made, and, still more, in which the affidavit was made and filed under that order, were such as to make it, in all reason, and upon all principle, the bounden duty of the Remembrancer and the Court, when the report should come before it as a matter calling for ultimate decision, to give the greatest, I had almost said the most implicit, credit to the affidavit of John Morgan.

Sir Watkin Lewes was to have above ten weeks to repent of the course he had taken, to abandon his contumacious refusal, to answer, and to put in his examination. He did no such thing: with a power of answering he chose to be silent; with a liberty given to him to tell his own tale, on oath, he chose to abandon that privilege, with a facility afforded him, that, above all others, which an honest party, conscious he had nothing to conceal, and satisfied his case was a sound and good one, would have coveted, namely, the liberty of telling his own story, and making it evidence for himself; he rejects the proffered boon — he repudiates the liberty allowed him, the privilege given him — he remains as silent as before. This he does, with

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this alternative staring him full in the face, the alternative levelled at him by the order of the 13th of November, 1818, that if he did not answer, upon his own oath, not merely he lost the opportunity which other litigants consider of great advantage, namely, of having his own affidavit in answer to the interrogatories taken as a portion of the evidence in the cause, but that his adversary John Morgan should be allowed to come in with *his* affidavit, and to tell *his* story upon *his* oath. Yet still he will not swear. This, to my mind, is conclusive.

It has been suggested that Sir Watkin Lewes was not a man of good judgment, or clear understanding. But, at all events, he was a man who knew what he was about; he was a barrister of some standing before he quitted the bar—a man engaged in business all his life—a man of litigious habits, who scarcely ever allowed a day to pass when a motion could be made for or against him in the course of his cause without attending it himself in person. To say that he was not aware of the consequences of his not complying with the former orders, and answering his adversary's interrogatories, is absurd. To say that he was not aware that if he did not answer, Mr. Morgan would make affidavit, is fanciful. To pretend that he was not aware of the necessary effect of the order of the 13th of November, 1818, and that the consequence was not present to his mind as of necessity following, namely, that Mr. Morgan's affidavit would be let into the cause in default of his answering, is vain. No one acts without some reason in important matters,—no man acts without some motive. Can man's imagination conceive

any but one reason, any but one motive, which would seal the lips of Sir Watkin Lewes, after the order of the 18th of November, 1818, and prevent his adopting the favourable alternative when the Court gave him his choice of answering the interrogatories? One, and but one, reason can any man's imagination devise for such conduct, consistently with the belief of Sir Watkin being a person of sound mind, viz. that he knew that if he were to answer the interrogatories upon his oath, and to answer truly, he must tell a story more unfavourable to himself than any which John Morgan would tell. I do not even stop short of that conclusion, that he was aware that nothing which Morgan would truly swear against him would be worse for him than that which he, if he told the truth, must swear in answer to Morgan's questions. I go further, and infer that it was more to his prejudice to tell the story himself than to have the story told, which he expected to proceed from Morgan. It was this, among other reasons, which prevented Sir Watkin from swearing: there is no other way of explaining his refusal to answer, and his embracing the alternative of accepting the case made by his adversary's evidence.

From this conclusion what inference can you draw but that, in effect, Sir Watkin Lewes's affidavit is before you? It may be called John Morgan's, but it appears to me that in truth it is Sir Watkin Lewes's, for he had the opportunity of telling his own story, and was warned that if he did not his adversary should be heard to tell his story against him. When he embraces, therefore, the alternative of silence, and prefers his adversary being heard, he, in effect, gives credit to that story;

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and the affidavit, by acquiescence, may be considered as his own. It may be called the affidavit of John Morgan, but it is in reality the statement of Sir Watkin Lewes.

This, then, is the common case of a party swearing against another, that other having the opportunity of answering and abandoning that opportunity, and allowing the affidavit of his adversary to stand against him; and it is every day's practice in all the Courts of Westminster Hall in such a case, to hold the party who does not answer, as confessing that he has no answer to make to his adversary's statement, and as clothing his adversary's statement with a full and conclusive authority against him.

This is the ground upon which I hold that the affidavit of John Morgan admitted under the order of the 13th of November, 1818, is not only competent, but almost conclusive evidence of the fact of the advance of money which he sets forth. He produces the instrument in confirmation, the instrument being not sufficient of itself only because he stands in the relation of a solicitor to a client; but then this instrument is corroboratory of the affidavit.

This disposes of a large portion of the case. In the view which I have taken, it disposes of those exceptions which were overruled below, and the finding of the second report,—I mean the report of the Master of the 10th of December, 1828. I shall enter into the detail of that report when I come to the particular alterations which I think ought to be made in the decree.

I proceed to observe upon the question raised by the consideration of that report of the 10th of December, 1828. The objection I have taken to



that report is a material one, but I know not whether I should not object to the whole of it; for I have great doubt, and much more than doubt, of the propriety of the order which was made on the 3d of May, 1827, referring back the report which had been made on the 11th of December, 1826, to the Master. I have a strong opinion against the fitness and regularity of that order referring back the report. If it ought not to have been referred back, that would put an end to the report of December, 1828, which was founded upon the reference. The former report was reviewed in consequence of the order; it was reviewed, altered, and re-constructed on principles dictated by the order, the erroneous order, in my opinion, of the 3d of May, 1827. To take a general view of that question is, in my view of the case, perhaps unnecessary; I shall, however, proceed to state the grounds on which I differ from the Court below as to that order of the 3d of May, 1827, referring back the report to the Master.

With respect to the report of the 11th of December, 1826, the more I consider it the less objection I am disposed to make to it, whether in reference to the evidence in the whole case, or its alleged consistency, on the one hand, or the discrepancy set up, upon the other, with the orders of your Lordships' House. I do not incline to think it materially differs from the orders of your Lordships' House. I am quite certain that with those orders the report of December, 1828, the subsequent report which was, as it were, forced upon the Master by the order of May, 1827, cannot so well stand as can the report of December, 1826. But it is not necessary in the view I have taken, to go much

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at large into that question ; for I am of opinion that it was irregular in the Court, and contrary to the rules of practice, to send back that report by the order of the 3d of May, 1827. To the report of the 11th of December, 1826, no exceptions had been taken, nor had any previous objection been ever brought in before the Master to that report ; it was sent back to the Master as upon a disapproval of the report itself, and a further inquiry directed by an order made the 3d of May, 1827, upon further directions. Now, generally speaking, that cannot be done ; the practice of the Court wisely prohibits it, and upon solid grounds. The Master ought not to be surprised by the exceptions without notice being given him by way of objection. I take the rule as fixed to be that you cannot except to the Master's report without first taking objections. If it should so happen that you are surprised when you mean to except, and if from accident, or any contrivance, or through excusable neglect, you have been deprived of the opportunity of regularly taking in your objections to the report, you may file an affidavit shewing the circumstances, explaining in what the surprise consists, and tracing it to its source. If you shew you have been surprised by the sudden signing of the Master's report, or anything which precluded you from the opportunity of taking in your objections, on satisfying the Court of that, by affidavit of the fact, you may have special leave of the Court to file exceptions without having previously taken in objections ; that is the practice of the Court.

• But that is not all. There is an order of Court of the 20th of July, 1793, which prohibits exceptions from being received to a report except on the

signature and certificate of counsel, that he has examined them and thinks the objections are well founded; and moreover there is a deposit, being half the amount deposited in the case of appeal, which is twenty pounds, as a security for costs in case the exceptions are overruled. It is not mere matter of form, but of substance, and important substance, that parties should not be allowed to pass by all those regulations; that, in the first instance, objections should be taken, so that the Master may reconsider the matter, and make a right report instead of one open to exception, otherwise needless litigation may be occasioned in the Court when the report might have been set right in the Master's office. In the next place, there is the security to the other party that he shall have the certificate of counsel, and to the Court that its time shall not be needlessly occupied, and there is also also the security by the deposit. But if parties — without making objections to the report while still before the Master — without any security against frivolous objections by the deposit and certificate, — shall be permitted on further directions to raise exceptions, and to have the whole matter referred back to the Master on those exceptions so taken, it is clear that all the regulations which have been made for the benefit of the Court, the suitors, and the public, to save time, and to avoid useless litigation and expense, are vain.

Cases were referred to in which it is said that the Court will upon further directions alter the Master's report. Now I do not deny that there are such authorities. But the only case in which the Court will upon further directions disallow a report, is where there is error in law appearing upon the

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face of the report, which would be a blot upon the proceedings of the Court. In such case the Court will set that error right upon further directions. In *Adams v. Claxton*\*, Sir William Grant says, "No exception is taken to the report, but the whole matter appears upon the face of it; and therefore it is contended, that it is open to inquire, whether the Master's conclusion is right, and I apprehend it is so open;" and he entered into the consideration of the matter, and came to a different conclusion from that to which the Master had come in his report.

But how can the Court apply this practice to other cases, except by taking the proposition negatively, and laying down that, though the error does not appear upon the face of the report, there may still be exceptions regularly and formally taken? But this is contrary to *Brodie v. Barry*†, where it is said, that "on a petition to confirm a report, and praying consequential directions, a party cannot, without presenting a counter petition, shew cause against the confirmation, except upon grounds appearing on the face of the report." In the present case no error appeared upon the face of the report; but it was referred back to the Master to enter into a new inquiry. I hold that it was erroneously referred back, and so far that the order of the 3d of May, 1827, was wrong. But, even if it had been regularly referred back, even if we had a right to listen to the contention on the part of the Respondent; if leave had been asked, and the Court had given them leave to file exceptions without that previous procedure, which I hold to be matter of substance as

\* 6 Ves. 226.

† 1 Jacob and Walker, 470.

well as form, — it appears to me that this order of May, 1827, could not stand; that it would have been erroneous to have referred it back on the ground taken by the Chief Baron; namely, that the report of December, 1826, could not stand, though not excepted to because a judgment of the House of Lords was set at nought by it, that report being contrary to the order of the House of Lords. I shewed that it was not contrary to the order of the House of Lords, and that, therefore, on this ground, the order of May, 1827, was not warranted. I have thought it fit to address myself to this part of the case, because it has been a good deal argued, but I know not that it was necessary to the decree I am about to propose.

I come now to the third question, that which relates to the interest not being allowed. That, generally speaking, judgments do not carry interest either at law or in equity, is as admitted; unless there be something in the dealing of the parties, or some order made in the particular cause to take it out of the rule. But I find that in this case there is a great peculiarity, or one quite sufficient for the purpose. In the first place the warrant of attorney with the memorandum endorsed, on which judgment was entered up in Trinity term, 1778, specified in the defeasance, that the within warrant of attorney was to secure the sum of 1142*l.*, together with the lawful interest for the same. Now if that warrant is in the cause *cadit questio*; but supposing that it is out of the cause (a reference to it was much objected to, and I did not feel satisfied that I was entitled to import it into the cause), — supposing we leave it out entirely, I am still of opinion that interest should be allowed upon this

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judgment. First of all, nothing can be more harsh or less equitable than that the monies which John Morgan received, the rents of Sir Watkin Lewes of which he had perception, should be all charged with interest against him, and in favour of Sir Watkin Lewes; and yet that the monies he advanced for Sir Watkin Lewes, and for securing which he had recovered judgments, should bear no interest at all, and that during a period of something about half a century. In the next place, can any thing be more extraordinary than the opinion which holds, the words of the order, or whatever it may, be embracing, "securities, mortgages, bonds, and costs," do not embrace judgments? And yet that is the understanding which has been supported elsewhere.

Let us look at the order of the 11th of July, 1810, the governing order, as I think, upon this point, and see whether a reasonable doubt can be entertained that under the "securities" judgments must be comprehended. There is a judgment, entered up on the part of the Appellants, given by the person who had borrowed the money to the person who had advanced it. The question is, whether in legal acceptance, or common parlance, judgments of any kind, but especially a judgment entered up on the warrant to confess a judgment given by the debtor to the creditor does not come within the description of securities in the order of July, 1810. That order was obtained by Sir Watkin Lewes, and consented to on the part of his adversary, that the Remembrancer should "take an account, and make a separate report of the principal and interest due to the said Defendants, or claimed to be due to them, or any or either of

“ them, upon the securities in that cause mentioned,  
 “ and otherwise, together with the costs directed by  
 “ the decree made on the hearing, to be taxed with  
 “ legal interest from the filing of the said bill in the  
 “ year 1788, deducting thereout and giving credit  
 “ for the rents and profits of the estates in the plead-  
 “ ings mentioned, and other monies received by  
 “ the said Defendants, or any or either of them, or  
 “ by any person or persons on their account, for the  
 “ said complainants’ use; and in taking the said  
 “ accounts the said Deputy Remembrancer was to  
 “ make the usual half yearly rests,” and so on.  
 I entertain no doubt, on the whole matter, that  
 the word securities includes and comprehends this  
 judgment as much as any other security.

This then affects a very material part of the case,  
 for it affects a sum, large unfortunately, from the  
 efflux of time, for interest with rests, which the  
 same order of the 11th of July gives upon the sum  
 contained in the two judgments, one of those judg-  
 ments for 1142*l.*, namely, the judgment of the  
 Court of King’s Bench, in the month of June,  
 1778, the other for 569*l.*, namely, the judgment  
 in Easter term, 1779; therefore there is the in-  
 terest which ought to have been allowed upon  
 the sum of 1711*l.*, being the amount of the two  
 judgments mentioned in the report of the Master  
 of the 11th of December, 1826, sent back to be  
 reviewed, but which, in my opinion, was a right  
 report, and ought not to have been sent back.

I have now gone through the whole of the  
 three points on which I find it impossible to agree  
 with the Court below. There remains only the  
 question of costs. Now, upon that I did not pro-  
 fess to feel any great doubt when the case was last

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before your Lordships. We are here dealing with the case of mortgagor and mortgagee: unless you can shew anything to except it from the general rule, the costs of the mortgagee must be satisfied. There are excepted cases; but it lies on the mortgagor to shew the exception, and that is not done here. I am, therefore, of opinion that there ought to have been costs given. The order of the 20th of June, 1801, was obtained by Sir Watkin Lewes, not by Mr. Morgan, but resisted, as I understand it to have been, by Mr. Morgan, and imposed upon him by the Court in favour of Sir Watkin Lewes. It is hardly possible to say how much of this tedious and costly litigation sprang from that order. If I were to say nine parts in ten of the whole costs have originated in that order — if I were to say ninety-nine parts in a hundred of the difficulties which have occurred flow from the same source — if I were to say that the complexity and obscurity which involves every part of it, and which leaves me in the predicament of not being quite certain, even at this moment, whether I have that accurate knowledge of the case which a tenth part of the time bestowed on almost any other case I have ever seen, would have enabled me to feel confident that I had attained — I should hardly exaggerate. At any rate, great difficulty and great expense have resulted from that unfortunate order of June, 1801, which was a bad substitution for a very different order under which the parties had been acting ever since the month of July, 1796.

I shall now, my Lords, shortly go over the different parts of the decree in which I differ with the Court below. I shall direct a copy of the minute



in my hand to be given to Mr. Courtenay, and I am glad to see that the parties have the benefit of Mr. Gurney's note of that which I have stated. It is desirable that the note should also be communicated to Mr. Courtenay, that he may more perfectly understand what I mean to express; and I have no doubt the parties will furnish it to him for his assistance in drawing up the order of your Lordships' House, so that every error, as to the details, may be avoided, and an accurate decree at length be made.

First of all I shall move your Lordships to alter the decree of the 3d of May, 1827, referring back the report of the 11th of December, 1826, to the Master, as far as regards such reference back. Secondly, I shall move your Lordships to alter the decree of the 6th of July, 1829, overruling the Appellant's exceptions with costs, and to declare that John Morgan has sufficiently proved his advance of 2400*l.* in respect of Sir Watkin Lewes's bond or bonds (one was a substitute for another), and therefore that the Master's report of the 10th of December, 1828, ought not to have disallowed the sum of 2431*l.* 13*s.* 1*d.*, or allowed in lieu thereof 1315*l.* 10*s.* Thirdly, to declare that interest should have been allowed on the judgment mentioned in the report of the 11th of December, 1826, viz. on the sum of 1142*l.* recovered by the judgment of the Court of King's Bench in Trinity term, 1778, and 569*l.* by judgment of the same Court of Easter term, 1779. Fourthly, to declare that so far as is necessary for working out the object of those declarations and making those alterations, the order of 24th of June, 1801, should not have been substituted for that of the 2d of July,

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1796. This is necessary, though it will be found more form than anything else. Fifthly, that the order of the 4th of February, 1827, overruling the Appellant's exceptions be altered, and those exceptions allowed, only so far as is necessary for working out the object of the second and third declarations, and also as to the Appellant's costs. Sixthly, that so much of the decree of the 12th of May, 1829, the main operative decree, should be altered, as consists of formal declarations in the first instance, and also as far as regards the Appellant's costs, and that he should be allowed his costs; and that the decree of the 6th of July, 1829, should be altered as regards the Appellant's costs, and that the Appellant should be allowed his costs in that behalf in which he is charged with the Respondent's costs.

My Lords, with respect to the cross appeal, I move your Lordships that the cross appeal be dismissed, and the judgment of the Court below affirmed with the costs of that appeal; and I have no hesitation in saying that I am moved thereto by this consideration, not that I think the parties were obliged to bring before this House the cross-appeal; it might perhaps have been avoided; but as I have no power of allowing the Appellant, the representative of Mr. Morgan, his costs in the principal appeal, I am disposed on that account (which I might not otherwise have done) to allow the costs in the cross appeal to the Respondent in that cross appeal. He has been brought here by this erroneous judgment of the Court below, and in consequence of the conduct of Sir Watkin Lewes particularly in obtaining the order of the 20th of June, 1801, of his offering no evidence in support

of those charges he had made, and refusing to answer the interrogatories. Those circumstances make me regret that your Lordships cannot give to the party who has been dragged into this litigation his costs in the appeal, which is the source of the principal expense; but he is Appellant, and therefore we can give him no such costs. That, however, induces me to think that he ought to receive his costs where he is Respondent, though if that had stood alone I might not have advised your Lordships to give him those costs. The result will be to give him the costs in the cross appeal, but to give no costs in the principal appeal to this House. In order to the minute being prepared carrying into effect the views I have detailed to your Lordships, I would move that the further consideration of this case be adjourned.

Further consideration adjourned *sine die*.

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It was ordered and adjudged that the order of the 4th of February, 1827, overruling the exceptions, &c. be reversed and the exceptions allowed, and the Master to review his report: and that the decretal orders of the 3d of May, 1827, and the 12th of May, 1829, be reversed, and the exceptions to the Master's report of the 10th of December, 1828, be allowed; and that so much of the decretal order of the 6th July, 1829, as directs that the receiver of the rents and profits of the mortgaged estates should pass his final accounts and pay in his balances, &c. be affirmed, and that the residue of that order be reversed; and that it be referred to the Master to tax the costs of John Morgan, &c. and charge the same against the mortgaged estates, and that the sum due to Francis Morgan for prin-

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cipal, interest and costs, be ascertained, and that the cross appeal be dismissed with 230*l.* costs: and the House declared that Francis Morgan was entitled to be allowed all such monies as had been expended by him for costs or otherwise under any of the orders which were thereby reversed, with leave to apply to the Court of Exchequer in respect thereof, &c.

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## IRELAND.

(COURT OF CHANCERY.)

The Most Noble GEORGE AUGUSTUS }  
 Marquess of DONEGAL, GEORGE }  
 HAMILTON CHICHESTER, com- }  
 monly called Earl of BELFAST, } *Appellants,*  
 and FREDERICK RICHARD CHI- }  
 CHESTER, commonly called Vis- }  
 count CHICHESTER, son of the }  
 said Earl, and a minor - }

HENRY GRATTAN, Esq., and MARY }  
 O'KELLY GRATTAN his wife - } *Respondents.*

The balance of a claim upon an account was settled by an award in 1799; which was neither acted upon nor expressly rescinded. This account, together with other claims, was made the subject of several references from time to time, until the year 1819, when a balance was ascertained upon a negotiation; and the debtor executed a mortgage to secure the amount. At this time judgments and executions, which had been obtained by the creditor, were outstanding against the effects of the debtor. In 1827 and 1828 the creditor, in consequence of difficulties in making the mortgage available for the liquidation of the debt, proceeded upon old judgments for parts of the amount secured by the mortgage.

Upon a bill filed by the debtor to set aside the mortgage deed and open the account, upon the ground of oppression by the creditor, and errors in the account, and a cross bill by the creditor, to establish the deed and take the account upon the proof of it, a decree was made, dismissing the original bill and directing the account as upon the cross bill; and this decree was affirmed upon appeal, except as to a sum of 3560*l.*, part of the amount secured for insurances upon the life of the debtor, it not being alleged or proved that the

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creditor had paid such insurances, and also such parts of a sum of 1000*l.* as had been paid by the debtor for costs, which had been erroneously included in the amount secured by the mortgage; and in respect of such exceptions the decree was reversed, and the account directed to be taken, with allowance of credit to the debtor as to such sums.

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THE Appellant, the Marquess of Donegal, filed a bill in the Court of Chancery in Ireland, stating a case to the following effect: — In the year 1794, he, being entitled in remainder to large estates in Ireland, then in the possession of his father, Arthur Marquess of Donegal, purchased from Philip O'Kelly a brood mare, three colts, and a filly, for the sum of 3750*l.* sterling, and not having the means of paying for the same, he gave three bonds to Philip O'Kelly, all bearing date the 22d of September, 1794, in the penal sums of 1100*l.*, 1100*l.*, and 14,700*l.* respectively, the two former being conditioned for payment of 550*l.* each on a day certain, and the latter being conditioned for payment of a sum of 7350*l.* immediately after the decease of Arthur Marquess of Donegal. And as a further security, the Appellant, the Marquess of Donegal, on the same day executed to Philip O'Kelly a mortgage of the Irish estates whereof the Appellant was then tenant in tail in remainder expectant on his father's decease, for securing to Philip O'Kelly a sum of 2650*l.* English currency. By a subsequent recovery and new settlement of the estates during the life-time of Arthur Marquess of Donegal, the Appellant, the Marquess of Donegal, became tenant for life only of the said estates, with remainder to his first and other sons successively in tail male, according to the usual course of family settlements:

and Philip O'Kelly having obtained warrants of attorney with the bond for 14,700*l.*, entered up judgments thereon in the King's Bench in England and Ireland as of Michaelmas term, 1794.

Arthur Marquess of Donegal died in January, 1799, and thereupon the Appellant, the Marquess, by indenture bearing date the 20th of April in the same year, conveyed his life estate, of which he was then seised in possession, to trustees, for the purpose of paying thereout his fair creditors by annual instalments. Soon afterwards Philip O'Kelly became pressing for payment of his demands, but his claims were resisted by the trustees; and on the 16th of March, 1801, a bill was filed in the Court of Chancery in England, in the name of the Appellant the Marquess of Donegal, and his trustees, against Philip O'Kelly, praying an injunction to restrain him from taking out execution on the judgments, and also praying an account of the dealings and transactions of Philip O'Kelly with the said Marquess. The cause was heard before the Master of the Rolls, and by an order made in that cause by consent on the 10th of May, 1803, it was ordered that all matters in difference between the parties should be referred to Sergeant Runninton. On the 31st of March, 1804, Sergeant Runninton awarded that on the balance of all dealings and transactions the Marquess was indebted to Philip O'Kelly in the sum of 2100*l.*, and that on payment thereof Philip O'Kelly should deliver up and cancel all the securities he had obtained from the Marquess, except a debenture for 1000*l.* referred to in the award; and he further awarded that mutual releases should be executed. By a subsequent order of the 4th of May, 1801,

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made at the instance of Philip O'Kelly, Sergeant Runnington was ordered to review his award, not altering or varying the amount awarded, and to state how much of the sum so awarded became due on or before the 20th of April, 1799. On the 17th day of July, 1804, Sergeant Runnington made his further award, stating that he had reconsidered all the evidence formerly laid before him, and he found that on the 20th of April, 1799, a sum of 3687*l.* 7*s.* 0*½d.* was due and owing by the Marquess of Donegal to Philip O'Kelly; but he further found that, between that day and the date of his former award, that sum had been reduced by payment of money, the acceptance of a debenture, and other means, to the sum of 2100*l.*

In a cause in England of Jones against the Appellant, Philip O'Kelly filed two charges grounded on these awards.

Philip O'Kelly died some time in the year 1805, and thereupon his eldest son and heir-at-law, Andrew Denis O'Kelly, obtained letters of administration of his personal estate. In the month of September, 1814, A. D. O'Kelly demanded payment of various sums alleged to be due from the Appellant, the Marquess of Donegal, to him, as well on his own account as on account of the aforesaid dealings with Philip O'Kelly; and it was finally agreed that the accounts between the Marquess and Andrew D. O'Kelly should be taken; and the result of the investigation was, that the demand of A. D. O'Kelly in his own right was settled at 9073*l.* 1*s.* 2*d.*, and his demand as administrator of his father at 5977*l.* 10*s.*, making together 15,050*l.* 11*s.* 2*d.* Immediately after these balances were so ascertained, the Appellant, the



Marquess, paid to A. D. O'Kelly a sum of 50*l.* 11*s.* 2*d.*, leaving 15,000*l.* exactly as the then ascertained balance due from the Marquess to A. D. O'Kelly. The sum so settled as the amount of A. D. O'Kelly's demand in his own right included a sum of 2693*l.* 9*s.* for interest upon the other items of the account. It also included two sums of 176*l.* and 1456*l.* 12*s.*, claimed by A. D. O'Kelly in respect of dilapidations of certain premises at Epsom, which the Appellant, the Marquess, had held as tenant to A. D. O'Kelly. A. D. O'Kelly, at the time of the investigation, claimed a further sum of 2650*l.* on account of the same dilapidations, but it was agreed to leave that claim out of the account, to be reserved for future arrangement.

The sum to be secured being thus settled, an agreement was drawn up and signed by both parties, on the 15th of October, 1814, to the following effect; namely, that a sum of 3000*l.*, part of the said sum of 15,000*l.*, should be paid by the Appellant's trustees out of the first rents to be received, after paying the Dowager Marchioness of Donegal's jointure, and certain sums due for interest to Mr. Horsley's executors and Lord Spencer Chichester; that a bond should be executed by the Marquess in the penal sum of 24,000*l.*, to secure the remaining sum of 12,000*l.*, by half-yearly payments of 500*l.* each, with interest at five *per cent.*, and the judgment for 14,700*l.* was to remain as a security, first for the payment of the 3000*l.*, and afterwards, together with the bond for 12,000*l.*, for the payment of the half-yearly instalments of 500*l.*

At the time of signing this agreement A. D.

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O'Kelly urged his claim for an allowance on account of assurance, which he proposed to effect on the Appellant's life. The question as to this claim was referred by the Marquess of Donegal and A. D. O'Kelly to the Earl of Massareene, as arbitrator; and on the 17th of October, 1814, he awarded against any allowance on that account.

Immediately after the agreement of the 15th of October, 1814, had been signed, an order, bearing date the 15th of October, 1814, was given to A. D. O'Kelly by the Appellant, the Marquess of Donegal, signed by him, and addressed to his trustees, Messrs. Batt and Getty, who were then in receipt of his rents, directing them, within six weeks, to pay to A. D. O'Kelly 3000*l.* out of the rents arising from the estates of the said Marquess.

The trustees upon application, stating that they had no funds in hand to answer the demand of the 3000*l.*, A. D. O'Kelly, on the 15th of November, 1814, entered a rule for judgment on the *scire facias*, to revive the former judgment for 14,700*l.*, and immediately thereupon, sued out and issued a writ of *feri facias* against the goods of the Marquess.

Thereupon the Marquess filed a bill in the Court of Chancery in Ireland, against A. D. O'Kelly, praying for an injunction, and an account, and offering to abide by the agreement of the 15th of October, 1814. By an order made in that cause, dated the 2d of March, 1815, A. D. O'Kelly was restrained from further proceeding on the judgment, on condition of the Marquess paying him the sum of 3000*l.*, and upon the further condition that the Marquess should effect an insurance on his life for 12,000*l.* The 3000*l.* was accordingly

paid, and the insurance was effected, and the policies were lodged in court. The half-yearly instalments of 500*l.* each, were afterwards paid, according to the agreement of the 15th of October, 1814, up to November, 1817, and the insurance was maintained up to the same period.

In the year 1816, the Appellant, the Marquess of Donegal signed a memorandum, dated the 20th of August, 1816, consenting to stand charged with a sum of 4253*l.*, on account of an annuity granted by him to one Sparks, which A. D. O'Kelly alleged that he had been obliged to pay as surety, and a sum of 4747*l.* on the dilapidation account reserved; and the Marquess handed the same to his solicitor, Mr. Scott, with directions not to part with it until the vouchers and bills were given up, or the Marquess should be sufficiently guaranteed by A. D. O'Kelly.

A. D. O'Kelly having obtained possession of this memorandum, without producing any vouchers, commenced an action against the Marquess in the King's Bench in Ireland, for the sum acknowledged by the memorandum to be due; and the Marquess being advised that at law he had no defence to the action, gave a *cognovit*, confessing the claim, and A. D. O'Kelly, obtained a judgment in Trinity term, 1817, for the full amount, *viz.* 10,215*l.* 15*s.*, late Irish currency, and 40*l.* 4*s.* 10*d.* costs. On the 7th of June, 1817, A. D. O'Kelly issued a writ of *fiery facias* against the Marquess, on the judgment so lastly obtained, directed to the sheriff of the county of Antrim, and a duplicate to the sheriff of the county of Down, marked each for the sum of 10,255*l.* 19*s.* 10*d.*, and he caused the sheriff to seize the Marquess's goods in the

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county of Down, and on the 24th of November, 1817, procured a return on the writ of goods on hand, and kept up the execution, by a succession of writs of *venditioni exponas*, until the month of August, 1818. During this period the Marquess's solicitor opened a negotiation with A. D. O'Kelly, in order to ascertain the terms on which A. D. O'Kelly would withdraw the execution. On the 13th of March, 1818, A. D. O'Kelly put an end to the negotiation by issuing a new writ of *venditioni exponas*.

On the 22d of May, 1818, 1000*l.* was paid to A. D. O'Kelly. The Marquess's injunction bill was dismissed; the injunction was dissolved, and the policies of insurance which had been effected under the order of the Lord Chancellor, of the 2d of March, 1815, were delivered to A. D. O'Kelly, together with a debenture for 1000*l.*, which had been lodged in court in the same cause. The agreement of the 15th of October, 1814, was delivered up and cancelled. All this was done under the requisition of A. D. O'Kelly, and the pressure of the execution and other circumstances, whereupon A. D. O'Kelly, in the month of August, 1818, withdrew his execution.

Pending the negotiations, the Appellant, the Earl of Belfast, who was the eldest son of the Appellant, the Marquess of Donegal, attained his age of twenty-one years, and arrangements were made for the purpose of cutting off the entails of the family estates, and paying off a portion of the Marquess's debts. A recovery deed was prepared, and in the preparation thereof it was found that, by virtue of the mortgage of 1794, the legal estate was vested in A. D. O'Kelly, as heir-at-law of his

father, the mortgagee ; and consequently the recovery deed was prepared, making him a party. But A. D. O'Kelly requiring that his demand should be admitted as a first charge upon the inheritance, refused to execute the recovery deed, making a tenant to the freehold, and on the 14th of November, 1818, renewed his execution, by issuing two new writs, marked each for the sum of 10,256*l.* 19*s.* 10*d.* On the 30th of November, 1818, he filed his bill against the Marquess, in the Court of Chancery in Ireland, for a foreclosure of the mortgage of the 24th of September, 1794. The Marquess and Earl, finding that recoveries could not be suffered, and consequently that they could not be released from their embarrassments without the concurrence of A. D. O'Kelly, admitted his full demand, as he had himself made it out, and consented that the full amount thereof should be made the first charge on the inheritance. Under these circumstances, a deed was prepared and executed by A. D. O'Kelly, and by the other necessary parties, whereby the estates were conveyed to a tenant of the freehold, for the purpose of suffering new recoveries ; and by the same deed a sum of 27,934*l.* 12*s.* 4*d.* Irish currency, being the amount of A. D. O'Kelly's amended demand, was made a first charge on the inheritance of the estates.

This new deed bore date, and was executed on the 12th of February, 1819, and the recoveries were suffered on the same day, being the last day of Hilary term. Subject to this charge, and to other incumbrances, the estates were settled on the Marquess and Earl successively for their lives, with remainder to the first and other sons of the Earl successively in tail male. The Appellant, Viscount

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Chichester, was the eldest son of the Earl of Belfast. The Marquess also gave A. D. O'Kelly an undertaking to pay him, besides the sum secured by the deed, a sum of 1000*l.* in lieu of costs.

The sum of 12,934*l.* 12*s.* 4*d.*, Irish currency, was represented by the bill to be made up in the following manner:— It consisted of three different accounts; namely, first, the sum due to A. D. O'Kelly, as administrator of his late father, and which was called the administrator's account. Secondly, the sum due to the said A. D. O'Kelly, on account of his private dealings with the Marquess, and which was called, the private, or personal account; and thirdly, the sum due in respect of the Epsom dilapidations, and the payments in respect of Sparks' annuity, and which was called the dilapidation account. Upon the first account, A. D. O'Kelly, omitting all consideration of Sergeant Runnington's award, charged the Marquess with the sum of 3750*l.*, as the principal sum due on the sale of the horses in 1794, and with another sum of 398*l.* 2*s.* 1*d.*, said to have been paid by the said Philip O'Kelly, on account of the Marquess, in the year 1792, with compound interest at five *per cent.* on those sums up to the 22d of May, 1818, and a further charge of 2*l.* 10*s.* *per cent.* up to the same period, as the amount necessary during that period to effect an insurance on the life of the Marquess, for the amount of his debt, although no such insurance was ever effected.

The amount due from the Marquess on the administrators' account, was made to amount, on the 22d of May, 1818, to a sum of 12,094*l.* 4*s.* 7*d.*, late Irish currency.

On the private account, by the agreement of Oc-

tober, 1814, ascertained to amount to 9073*l.* 1*s.* 2*d.*, A. D. O'Kelly calculated interest at five *per cent.* on the sums from time to time due ; he gave credit to the Marquess for all sums which had been paid since 1814, as having been paid in liquidation of the private account ; and by these means the sum due on the 22d of May, 1818, on the private account, was reduced to a sum of 3326*l.* 11*s.* 3*d.*, late Irish currency.

On the dilapidation account, 9000*l.* sterling, with which the Marquess had agreed to be charged in August, 1816, A. D. O'Kelly added a sum of 789*l.* for interest, up to the 22d of May, 1818 ; and reducing the amount into Irish currency, the amount then claimed as due on that account, was thus made to amount to 10,604*l.* 15*s.* Irish currency.

A. D. O'Kelly then added a sum of 1130*l.* 17*s.* 8*d.*, being interest at the rate of six *per cent.* from the 22d of May, 1818, to the 12th of February, 1819, and a further sum of 778*l.* 3*s.* 10*d.*, being the sum for which an insurance might have been effected on the life of the Marquess ; whereby sums amounting together to the sum of 27,934*l.* 12*s.* 4*d.*, were, under the aforesaid circumstances, made a primary charge on the estates included in the recoveries of 1819.

No credit was given to the Marquess for the sums appearing by Sergeant Runnington's award to have been paid between the 20th of April, 1799, and the date of his award, nor for the sum of 50*l.* 11*s.* 2*d.*, paid in October, 1814, nor for the value of the policies of assurance delivered up to A. D. O'Kelly in 1818.

A. D. O'Kelly died in April, 1820, having by his will appointed Philip Whitfield Harvey, who

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was his heir-at-law, and principal devisee, James Foulds Cartles, since deceased, and the Respondent, Henry Grattan, his executors. Philip W. Harvey alone proved the will (the other executors having then declined to act), and also obtained letters of administration *de bonis non*, of the effects of Philip O'Kelly.

Soon after the death of A. D. O'Kelly, P. W. Harvey commenced an action against the Marquess, upon the undertaking given by him for the sum of 1000*l.* for costs, in February, 1819, and he obtained judgment, and was paid the amount; and in the month of January, 1821, P. W. Harvey filed his bill in the Court of Chancery in Ireland, against the Marquess, for the purpose of having the trusts of the deed of the 12th of February, 1819, carried into execution.

To this bill the Marquess put in his answer, impeaching several of the items, composing the gross sum of 27,934*l.* 12*s.* 4*d.*; whereupon P. W. Harvey, on the 16th of February, 1822, applied to the court for a receiver, which was refused, but the court ordered the Marquess to pay the arrear of interest then due, and the accruing interest on the sum of 2100*l.*, awarded by Sergeant Runnington, and that, in default thereof, a receiver should be appointed to such extent; and this order was affirmed by the Lord Chancellor on an appeal.

P. W. Harvey filed an amended bill on the 12th of November, 1822, to which the Marquess put in his answer, but P. W. Harvey did not take any further step in the cause.

P. W. Harvey having made his will, whereby he gave all his estate to his daughter, the Respondent, Mary O'Kelly Grattan, whom he appointed his



executrix, died in the year 1826, leaving her his heiress-at-law, and also heiress-at-law of P. O'Kelly and A. D. O'Kelly; and soon after the death of P. W. Harvey, Mary O'Kelly Grattan proved his will in the proper ecclesiastical court.

After the death of P. W. Harvey, the Respondent, H. Grattan, proved the will of A. D. O'Kelly, and obtained letters of administration *de bonis non*, of the estate of P. O'Kelly, and he then proceeded to revive the judgment obtained in Trinity term, 1817, in respect of the dilapidation account; and in Michaelmas term, 1827, the same was revived accordingly; and on the 29th of November he issued a writ of *feri facias* against the Marquess, directed to the sheriff of Down, marked for the sum of 9467*l.* 1*s.* 4*d.*, and caused the amount to be levied upon the goods of the Marquess, and the amount was levied and paid over to him accordingly.

In May, 1828, H. Grattan, as representative of P. O'Kelly, proceeded to revive the judgment of Michaelmas term, 1794, obtained by P. O'Kelly for 14,700*l.*, and obtained judgment of revival on the 23d of June, 1828, and thereupon the Appellants, on the 22d of June, 1828, filed their original bill in this cause, against the Respondents, in the Court of Chancery in Ireland, stating the facts aforesaid, charging fraud and oppression, and praying that the deed of the 12th of February, 1819, so far as it went to charge the estates of the Appellants, or any of them, with the said sum of 27,934*l.* 12*s.* 4*d.*, late Irish currency, with interest, might be decreed fraudulent and void as against the Appellants, or at least that it should not be permitted to stand further, or otherwise than as a

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security for the sums really and *bonâ fide* due to P. O'Kelly and A.D. O'Kelly, their representatives, or either of them; and that an account might be taken on the foot of the several dealings between Appellant, the Marquess, and P. O'Kelly, and A. D. O'Kelly, or either of them; and that the ascertainment of the damages for the alleged dilapidations of the premises at Epsom, and Sparks' annuity, might be set aside, the same being founded on a mistake; and that the sum to which A. D. O'Kelly was fairly entitled for such dilapidations and Sparks' annuity, might be ascertained; and that the original judgment and other securities before-mentioned, and which had been obtained by P. O'Kelly and A. D. O'Kelly, or either of them, might be set aside, or at the utmost might be permitted to stand as a security only for the amount of the respective sums, fairly and justly due on foot of the several demands, on account of which the said judgments or other securities were obtained; and that in the mean time the Respondents, H. Grattan and M. O'Kelly Grattan, might, by the injunction of the Court, be restrained from issuing execution upon any of the said judgments; and that the award, and further award of Sergeant Runnington should be considered as binding and conclusive upon the parties; and that the Appellants, or such of them as should be entitled thereto, should, in taking such accounts, have credit for the value of the policies of insurance, which were handed over to A. D. O'Kelly at the time before-mentioned, and also for the sum of 1000*l.*, which was recovered at law by A. D. O'Kelly's representatives, in the action grounded on the undertaking, which the said Marquess was

compelled to sign, in order to induce A. D. O'Kelly to execute the deed of the 12th of February, 1819, and might also have credit for all sums paid to P. O'Kelly, and A. D. O'Kelly or for their or either of their accounts; and also have credit for the said sum of 9467*l.* 1*s.* 4*d.*, levied by the Respondent, Henry Grattan, under the said execution; and that the said credits might be set off against any fair demands of the said Respondents, in right of P. O'Kelly and A. D. O'Kelly, or either of them, to be ascertained on the taking of such accounts aforesaid; and that the sum so levied as aforesaid, under the said execution, should be considered as in full discharge and satisfaction of the said judgment, and of the particular items relating thereto, and forming a part of the said sum of 27,934*l.* 12*s.* 4*d.* mentioned in the deed of the 12th of February, 1819; and in case, in taking the accounts aforesaid, it should appear that the said sum so levied, amounted to more than the sum fairly due for the said dilapidations and Sparks' annuity, then that the Appellants should have credit for the same as against the sum, if any, which might be remaining due on the foot of the other demands of A. D. O'Kelly, or P. O'Kelly; and that a balance might be thereupon struck; and that upon payment of such balance, if any, to the Respondents, or such of them as might be entitled to receive the same, that the said Respondents, or such of them as ought so to do, should reconvey to the Appellants according to their right, or to a trustee for them, the legal estate vested in them, under and by virtue of the said deed of the 12th of February, 1819, or by the mortgage of the 22d of September, 1794.

An injunction, obtained for want of answer, was

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continued to the hearing. The Respondents filed their answer on the 28th of November, 1828, and an order was made at the Rolls, on the 28th of January, 1829, continuing the injunction until the hearing, which order was afterwards, on the 27th of June, 1829, on an appeal to the Lord Chancellor, affirmed.

The Respondents filed their answer on the 22d November, 1828, denying the allegations of fraud and oppression stated in the bill, and, in effect, that the awards by Runnington, and the former settlements, had been abandoned by all parties, and the account and deed consequent thereon, of February, 1819, finally substituted. In 1829, they filed a cross bill, the same in substance as the answer. The Respondents therein stated all the transactions anterior to the deed of February, 1819, and the modes in which the Marquess had continually deferred payment of the sums due from him. They then stated, that the settlement of accounts contained in that deed was effected with deliberation and advice by the Marquess, and that he still refused to pay the amount, which he there acknowledged to be due; and it was thereby prayed that the deed of 12th February, 1819, might be declared good and valid, and that the charge created thereby might be declared a good charge, and binding on the estate of the Appellants, comprised in the said deed; and that it should be referred to the Master to take an account on foot of the deed, of the principal sum and interest thereon from the date of the deed, and, after all credits allowed to the Appellant, the Marquess, for all payments made subsequent to the execution of the deed by or on account of the debt so ascer-

tained, that a balance should be struck on foot thereof, and that the balance so discovered might be declared a good charge on the estates of the Appellants, and that the Marquess might be decreed to pay unto the Respondents what should appear to be justly due and owing to them on the taking of the account, together with the costs of the suit, by a short day to be appointed by the Court for that purpose, the Respondents being ready and willing, and thereby offering, on being paid their principal money and interest and costs at the said appointed time, to reconvey the premises unto the Appellants, or unto either of them, as the Court should direct, or else that the injunction might be removed, and that the prior securities granted by the Marquess in 1794 might be declared to be collateral to the deed of 1819, and a foreclosure be decreed, as thereby prayed, in default of payment, and that a receiver might be appointed by the Court to receive the rents of the mortgaged premises, and that, if necessary, an account might be taken of all incumbrances prior to the Respondents' demands, and that the Appellant, the Marquess, might be decreed to discover what prior incumbrances existed affecting the lands, and whether any of the same were outstanding and suffered for the benefit of the Marquess, and that such of them as subsisted, or were kept on foot for the benefit of, or in trust for, the Marquess, might not be permitted to stand in the Respondents' way, and might be deemed to be satisfied, as far as might be necessary for the rights of the Respondents; and that the lands and premises comprised in the said mortgage of 1794, and deed of 1819, respectively, or a competent part thereof, might be sold

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for the payment of the sums respectively secured thereby to Philip O'Kelly and Andrew Denis O'Kelly, and unto the Respondents as their representatives, and all prior incumbrancers, and that all proper parties might join in such sale and in making out title to the purchaser or purchasers, and that the same might be decreed and taken as a cross bill against the said Marquess, the said Earl, and the said Viscount Chichester, and the said cause so instituted by them and this cause might be heard together.

After issue joined, much evidence was gone into on both sides, respecting the various claims and settlements made and attempted during the period that elapsed since the Marquess first incurred the debt.

The cause and the cross cause came on together to be heard before the Lord High Chancellor of Ireland, on the 5th December, 1831, and on the 12th December, 1831, his Lordship dismissed the Appellants' original bill with costs. And in the cross cause, in which the Respondents were Plaintiffs and the Appellants Defendants, his Lordship decreed, that the deed of the 12th February, 1819, should stand as a security for the sum of 27,934*l.* 12*s.* 4*d.* late Irish currency, with interest until paid, and that the same was a good and valid charge on the lands and premises in the said deed mentioned, and that the Respondents were entitled thereto; and that the trusts of the said deed, in relation to the said sum of 27,934*l.* 12*s.* 4*d.*, and the interest thereof, should be carried into execution; and it was referred to one of the Masters of the Court of Chancery in Ireland, to take an account of the sum remaining due to the Respond-

ents for principal and interest, under the said deed, after all just and fair allowances.

The appeal was against this decree.

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For the Appellants, Mr. *Knight* and Mr. *Rolfe*.

The account on which the charge for £7,934*l.* 12*s.* 4*d.* is founded, was not a fair account, but was forced upon the Marquess by stress of the execution issued by A. D. O'Kelly in 1817, and by other circumstances of distress and oppression. In the account in question, no credit is given to the Marquess for the sums paid subsequently to the 20th April, 1799, and which are alluded to in Serjeant Runnington's further award, and which at the date of that award reduced the debt to £100*l.*; nor for the sum of 50*l.* 11*s.* 2*d.* paid to A. D. O'Kelly in October, 1814; nor for the value of the policies of assurance handed over to A. D. O'Kelly in 1818. The Marquess is charged with a per centage by way of insurance upon his life for a large portion of the debt, but there is no proof in the cause, nor even allegation, that any such sums were actually paid, or any assurance really affected. The account charges interest upon many sums not in their nature bearing interest, and consolidating principal, interest, and insurance, as of the date of May, 1818, charges interest upon the entire sum for nine months to the 12th February, 1819. The Respondent, Henry Grattan, by his proceedings at law, must be deemed to have waived the benefit of the deed of 1819.

For the Respondent, the *Solicitor-General* and Mr. *Hall*.

No error is shewn in any of the accounts pro-

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posed to be opened. And if error could be shewn, it is not competent to the Appellants to open an account settled as it was by the deed of 1819. If there had been error, and it had been competent to the Appellants to seek relief against the settlement of 1819, there is not any safe mode of correcting such error, or any reasonable hope of arriving at a more sound and just conclusion than that adopted in the settlement. If the accounts were opened, under the circumstances of this case, and the death of the principal claimants so long ago, the Appellants would obtain an advantage, to which they are in nowise entitled. The vouchers for these accounts were produced upon former settlements; many of them are lost or destroyed, are not producible, and ought not now to be called for. *Lord Courtenay v. Goodschall*, 9 Ves. 473.; *Drew v. Power*, 1 Scho. & Lef. 192.; *Rosse v. Stirling*, 4 Dow. 442.

The Marquess of Donegal has been himself the author of all the delays and difficulties in settling the accounts. The settlement of February, 1819, was carefully considered and advisedly adopted, and formally executed by and on behalf of the Marquess of Donegal. It was a compromise of a claim, which is of itself a consideration, and will not be inquired into. *Cole v. Gibbon*, 3 P. W. 294.; *Atwood v. —*, 1 Russell, 353., affirmed on appeal before L. C. 5 Russ. 149.; *Naylor v. Winch*, 1 Sim. & Stu. 565.

The Appellants have not shewn any grounds for impeaching the validity, or disputing the fairness, of the settlement of 1819, or reducing the amount therein acknowledged to be due.

The Appellants have not, by their bill, shewn any equitable title to the relief thereby prayed,



and have not produced evidence to sustain the statements made in their bill, such as it is, or to invalidate the claim of the Respondents. The scope and prayer of the bill is to open the account, which will not sustain a decree to surcharge and falsify. To found the right to open the account, specific errors should be pointed out by the bill. *Taylor v. Hayling*, 1 Cox, 435.

The *Lord Chancellor*. — In this case I am of opinion, that an alteration, material at least as to the amount, must be made in the decree. I am not satisfied with that part of the decree which allows retrospectively and hypothetically, without any grounds whatever, the amount of premiums upon the life insurance, supposed to have been paid. I have been furnished by the respective agents with two statements of this matter, which differ materially in amount. Before the minutes are drawn up, the parties will come before the Assistant Clerk, Mr. Courtenay, and state to him upon what ground it is they have given in two such discrepant accounts, which must rest altogether upon figures. I propose to add 1000*l.*, because I think Colonel O'Kelly, after the settlement of 1819, extorted (I am bound to say extorted) from the necessities of the other party, an additional 1000*l.* And I cannot see, I confess, any reason that can be assigned why Colonel O'Kelly did not ask 10,000*l.* as well as 1000*l.* If the interest is not included, a sum will be added for it, which the parties will agree upon. The decree will assume something like that form, but the particular minutes will be settled, and given out to the parties to avoid dispute. In other respects, the decree ought to be affirmed.

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Ordered and adjudged, That so much of the decree in the suit in which the Marquess of Donegal and others were Plaintiffs, as directs that the Plaintiffs' bill in that suit be dismissed, be, and the same is hereby affirmed, and that the other directions contained in the same decree be, and the same are hereby reversed; and in the suit in which the said Marquess is Defendant, their Lordships declare that the Plaintiffs in that suit are not entitled to charge the said Marquess with any premiums for insurance of his life not actually paid: *And it appearing that the sum of 27,934*l.* 12*s.* 4*d.*, late Irish currency, in the said decree mentioned, is composed of such charges with interest to the extent of 3560*l.* 4*s.* 4*d.*, their Lordships order that the sum of 24,374*l.* 8*s.*, late Irish currency, be substituted for the said sum of 27,934*l.* 12*s.* 4*d.*, like currency: And it is further ordered and adjudged, that it be referred to the Master in the Court of Chancery in Ireland, to whom the said cause is referred, to take an account of the sum remaining due to the Respondents for principal and interest upon the footing of the present order, and that in taking the said accounts the said Marquess is entitled to have credit for such sum or sums of money as may have been paid in pursuance or part discharge of the undertaking, signed by the said Marquess in the bill mentioned, for payment of the sum of 1000*l.* for costs, and also such sum or sums of money as the said Marquess may have paid in respect of the costs by the first mentioned decree directed to be paid by the said Marquess, and hereby in that respect reversed from the respective times of such payments: And it is further ordered and adjudged, that the said decree in all other respects be, and the same is hereby affirmed.*

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## IRELAND.

(COURT OF CHANCERY.)

The Most Honourable GEORGE AUGUSTUS, Marquess of DONEGAL } *Appellant.*

JOHN S. SALT, JOHN TOWGOOD,  
 JOHN INGRAM, JAMES STRANGE,  
 JAMES DASHWOOD, ED. HOWELL,  
 JAMES STEVENS, and GEORGE  
 PEACOCKE, Esquires - - - } *Respondents.*

A suit having been instituted in the Court of Chancery in England, to carry into execution the trusts of a deed executed by D. in 1799, for the benefit of creditors holding debentures; the assignees of a bankrupt firm claiming under two debentures which had been deposited with the firm, for balances due and to become to them, went in under the decree to prove their claim. The Master reported as to one of the debentures, No. 26., that the sum secured by it was due under the deed of trust; but that there was not sufficient proof to establish the right of the claimants. Pending this suit a bill was filed in the Court of Chancery in England, for the administration of the estate of the bankrupt firm, in which, by an order of Court, a receiver of that estate was appointed. In this state of the proceedings, and while the creditor's suit in England was pending, a bill was filed in the Court of Chancery in Ireland by the assignees of the bankrupt firm and the receiver, for the same purpose as the suit then pending in England — viz. the execution of the trusts of the deed of 1799, and payment of the creditors holding debentures. In this suit proof was given before the Master of the execution and assignment of the debenture, No. 26., of the search for and loss of the original, and of an *examined copy*.

Upon this proof a decree was made, declaring the right of the

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assignees for payment of a certain portion of the sum due upon the debenture to the receiver in the English suit.

This decree was affirmed on appeal.

**THE** Respondents, in 1825, filed a bill, which was amended, in 1828, in the Court of Chancery in Ireland, against the Appellant and W. M'George. The bill so amended, stated the following case :— The Appellant, in the year 1799, was entitled, as tenant for life, in possession, without impeachment of waste, to real estates in Ireland, of very considerable yearly value; and was also entitled to several shares in the joint stock of the Lagan Navigation Company, in respect of a sum of 50,000*l.*, subscribed by his father, the late Marquess of Donegal, to that undertaking.

In order to provide for the payment of debts due to a numerous body of creditors, the Appellant entered into an arrangement with the Respondent, James Dashwood, John Agnew, deceased, and William M'George, a co-defendant with the Appellant in the suit which is the subject of the present appeal, by which those gentlemen, who were some of the acting partners of the firm of Walwyn, Strange, and Company, bankers, in New Bond Street, London, were to act in conjunction with William Lyon, deceased, the then solicitor of the Appellant, as trustees of a deed to be executed by the Appellant for the above purpose.

An indenture was accordingly executed by the Appellant and the said trustees, bearing date the 20th of April, 1799; and made between the Appellant, of the first part; the said James Dashwood, John Agnew, William M'George, and

William Lyon, of the second part ; and Francis Const, of the Middle Temple, Esq., and George Downing, of Lincoln's Inn, Esq. of the third part ; by which, after reciting, amongst other things, that the Appellant was entitled to the possession of the said real estates, subject to certain terms of years and charges therein mentioned ; and that he had contracted debts to a considerable amount, and was wholly unable to make provision for the payment thereof, except by sale of the said navigation shares, and out of the income of the estates he then was, and on the decease of Barbara, Marchioness of Donegall, would become entitled to for his life ; and that he had accordingly assigned the said navigation shares to the said James Dashwood, John Agnew, William M'George, and William Lyon, upon certain trusts for that purpose, by an indenture, recited in the indenture now in recital, the said Appellant demised all his manors, towns, land, premises, tenements, and hereditaments, situate and arising within the respective counties of Antrim and Donegal, the town of Belfast, the liberties of Carrickfergus, and the counties Donegal and Londonderry, to which he became entitled on the death of his late father ; and also all other lands, tenements, and hereditaments to which he became entitled as tenant for life, in possession and in remainder expectant, on the death of his said mother-in-law, unto the said James Dashwood, John Agnew, William M'George, and William Lyon, their executors, administrators, and assigns, for a term of ninety-nine years, from the day of the date of the said indenture, now in recital, determinable by the death of the said Appellant, without impeachment of waste, but subject to the

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several incumbrances therein mentioned ; being the several deeds and settlements subject to which the said estates had vested in the said Appellant upon the death of his said father, and upon the trusts therein and hereinafter mentioned. And after providing for the payment of the expenses attending the said trust, and keeping the said premises in repair, and for the payment of an annuity of 10,000*l.* to the Appellant, it was declared that the residue of the rents and profits of the said estates, and the annual profits of the said navigation shares until sold, and the nett produce of such sale should be an accumulating fund in the hands of the said trustees, to be applied as therein and hereinafter mentioned. And by the said indenture, the said trustees, or any two of them, were empowered to investigate and settle the claims of persons alleging themselves to be creditors of the Appellant; and also to enter into contracts with such creditors as to the time and manner of liquidating their demands, and as to the allowance of interest thereon ; and also to grant and issue assignable debentures to such creditors, or any of them, for better enforcing the performance of such agreement as last mentioned, so as each creditor accepting such debentures should enter into an agreement not to sue or molest the Appellant for his debt or demand, unless default should be made in payment of the sum secured by the debenture, and so as no debenture should be valid unless executed by the Appellant. And it was declared that the fund, by the said indenture directed to be accumulated, should be applied in payment of the debts, annuities, claims, and demands substantiated, compounded for, or secured in manner therein and herein-before men-

tioned; and after payment thereof, and of such costs and expenses as in the said indenture mentioned, that the residue should be held in trust for said Appellant, his executors, administrators, and assigns.

At the date of the last-mentioned indenture, the Defendant's father-in-law, Edward May, Esq., afterwards Sir Edward May, Bart., claimed to be a creditor of the Appellant to a considerable amount, and a deed or debenture, No. 24., bearing date the 28th day of May, 1799, was made and executed by the Appellant, of the first part; the said trustees, of the second part; and the said Edward May, of the third part; by which, after reciting that the said Edward May had claimed to be a creditor of the Appellant, and that such claim having been fairly investigated by all the said trustees, had been settled at the sum of 3000*l.* British; which sum it was agreed should be payable with interest at 5*l. per cent.*, in manner thereafter mentioned; the said Appellant by the said debenture declared, that the said Edward May was his creditor for the sum of 3000*l.* British; and that the same should carry interest from that day at the rate of 5*l. per cent. per annum*; and that the said principal sum and interest should be payable, by half yearly instalments, on the 5th of January and the 5th of July in every year, each instalment of principal money, amounting to 750*l.*, until the whole should be liquidated on the 5th of July, 1801; the payments to be made at the banking house of Messrs. Walwyn, Strange, and Company, and to be provided for out of the rents, issues, and profits of the said demised premises: and the said trustees agreed, by the said indenture, to make

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such payments accordingly, unless prevented by such accidents as therein mentioned. And it was further agreed, that the said debenture should be transferable by the said Edward May, his executors, administrators, and assigns, by any writing endorsed thereon or otherwise, so as notice of such assignment should be given to the said banking house; and it was further agreed, that the said Edward May, his executors, administrators, and assigns, should be precluded from commencing or prosecuting any action against the Appellant, his executors, administrators, or assigns, for any sum of money then due to the said Edward May, unless default should be made in some of the payments therein and hereinbefore mentioned; but in case of such default, the said Edward May, his executors, administrators, and assigns, were to be at liberty to proceed at law or in equity, for the recovery of the debt or debts then due to Edward May from the Appellant.

A similar deed, or debenture, was afterwards executed by the said trustees and the Appellant, bearing date the 14th of June, 1799, and numbered 26, containing similar recitals and clauses, and providing for the payment of a sum of 5000*l.* British, with interest at 5*l. per cent.*, to the said Edward May, his executors, administrators, or assigns, by instalments of 1375*l.*, 1343*l.* 15*s.*, 1312*l.* 10*s.*, and 1281*l.* 5*s.*, on the 4th of January and the 5th of July, 1800, and the 5th of January and the 5th of July, 1801.

At the time of the execution of the above debenture, the firm of Walwyn, Strange, and Company consisted of six partners; namely, James



Walwyn, Esq., the Respondents, James Strange and James Dashwood, the said John Agnew, and William M'George, and Gabriel Tucker Steward, Esq. Edward May kept an account with the firm, and being indebted to the firm in an amount exceeding 5000*l.*, he, on the 20th of June, 1799, signed an indorsement on the debenture, numbered 26., by which he directed that the principal sum of 5000*l.*, and all interest thereon, should be paid to James Walwyn, James Strange, James Dashwood, John Agnew, William M'George, and Gabriel Tucker Steward, their executors, administrators, and assigns; and he delivered over the debenture, so endorsed, to the firm.

The firm of Walwyn, Strange, and Company, received the first instalment of 1375*l.*, which became due on the foot of the said debenture in January, 1800, but no further sum had ever been paid or received, for principal or interest, in respect of such debenture.

James Walwyn died in October, 1800, and William M'George and Gabriel Tucker Steward soon afterwards retired from the firm, and the Respondent, George Peacocke, became a partner with the Respondents, James Strange and James Dashwood, and John Agnew, in a new firm of Strange, Dashwood, and Company, which carried on business at the same house in New Bond Street; and all the effects of the old firm, and the debts due to such firm, were transferred to the new firm; and the account with Edward May was also carried over, with his consent, from the books of the old firm to those of the new firm.

In 1803 the firm of Strange, Dashwood, and

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Company, became embarrassed, and in May in that year they stopped payment; and, in order to wind up their affairs, an indenture of bargain and sale and assignment, bearing date the 19th of July, 1803, was, in pursuance of a previous agreement in writing, bearing date the 15th of May, 1803, made and executed, between and by the Respondents, James Strange, James Dashwood, and George Peacocke, and the said John Agnew, of the one part; and the Respondents, John Towgood, John Ingram, and Walter Burrowes, since deceased, of the other part; by which all the estate and effects of the firm of Strange, Dashwood, and Company, were assigned to John Towgood, John Ingram, and Walter Burrowes, upon certain trusts for the sale thereof. By an indenture of even date with that lastly recited, made and executed between and by the partners of the said firm, of the first part; the said John Towgood, John Ingram, and Walter Burrowes, of the second part; and the several creditors of the said firm, who had subscribed their names and affixed their seals to the said indenture, of the third part; John Towgood, John Ingram, and Walter Burrowes were directed to apply the produce of the sale authorised by the former indenture in the usual manner towards payment of the joint and separate debts of the said firm and the respective members thereof; and to pay the residue, if any, to the respective members of the said firm who should be entitled thereto, in manner in the said indenture more particularly mentioned.

Previously to the execution of these indentures, a commission of bankrupt, dated the 23d of April,

1803, had issued against John Agnew, who was duly found, and declared a bankrupt under such commission ; and the Respondents, Edward Howell and James Stevens, were chosen assignees of his estate and effects, which were conveyed and assigned to them in the usual manner.

On the 27th of July, 1803, a decree was made in the English Court of Chancery, in a suit commenced by Henry Thomas Jones and Inigo William Jones, on behalf of themselves and the other debenture creditors of the Appellant, against the Appellant and the said James Dashwood, John Agnew, William M'George, and William Lyon, and one Peter Young and George King, for the purpose of establishing certain debentures held by the Plaintiffs, and issued under the trusts of the said deed of April, 1799. And by the said decree it was referred to the Master to take an account of what was due to the Plaintiffs, and to issue the usual advertisements for the other creditors of the Appellant, under the trust deed, to come in and prove their debts.

At the time when the firm of Strange, Dashwood, and Company stopped payment, Edward May was indebted to them on a balance of account in a sum exceeding 12,000*l.*, as the Respondents proposed to prove by a settled account signed by Edward May ; and in order to liquidate part of such balance, he assigned the debenture No. 24, and the sum of 3000*l.*, and interest secured by it, to the trustees of the said banking firm, by an indenture dated the 8th of August, 1804, and made between Edward May, of the first part ; John Reeves, banker, of the second

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part; and the Respondents, John Towgood, John Ingram, and the said Walter Burrowes, of the third part; and the Respondents carried in before the Master, in the suit of *Jones v. Lord Donegal*, a charge on foot of the debentures No. 26. and No. 24.: the former, however, had been lost, and the original had never been found, notwithstanding the most diligent search on the part of the Respondents.

The Master, in his report in the suit of *Jones v. Lord Donegal*, dated the 10th of August, 1804, certified that the Respondents, John Towgood, John Ingram, and the said Walter Burrowes, had claimed before him the sum of 3000*l.*, and interest from the 28th of May, 1799, on the debenture No. 24; but that inasmuch as it appeared to him that the Respondents, James Strange, James Dashwood, George Peacocke, and the said John Agnew, had in their hands, on the 19th of July, 1803, in respect of the trust estate under the said deed of the 20th of April, 1799, the sum of 2788*l.* 7*s.* 10*d.*, he had not allowed such claim; and he also certified against the claim carried in on foot of the debenture No. 26, on the ground that (being lost) it was not produced.

Exceptions were taken to this report on the part of the Respondents, John Towgood, John Ingram, and the said Walter Burrowes; and by a decretal order in the said suit, dated the 13th of November, 1805, it was declared that the principal and interest due on foot of the debenture No. 26., was a debt due from the Appellant; and that the said John Towgood, John Ingram, and Walter Burrowes, should be at liberty to prove the same without

prejudice to the question to whom the said debenture belonged ; and it was ordered that the Master should review his report.

A supplemental suit was afterwards instituted in England by the said Inigo William Jones, on the death of his brother, the said Henry Thomas Jones, against the Appellant ; and by a decree *nisi*, dated the 29th of February, 1808, made on the default of the Appellant, and made absolute by an order of the Court, dated the 22d of June, 1808 ; it was decreed, amongst other things, that the Plaintiff should have the benefit of the former suit ; and that the trust deed of the 20th of April, 1799, should be established, and the trusts carried into execution against the Appellant, so far as the same remained unexecuted.

Walter Burrowes died pending these suits ; and after his death, a suit was instituted in the Court of Chancery in England, by Sir George Anson, the Right Honourable Anne Margaret, Viscountess Dowager Anson, Thomas William Coke, Esq., and the Reverend Charles Anson, against all the Respondents, except John Stevenson Salt, which had for its object the administration of the estate of the late firm of Strange, Dashwood, and Company ; and by an order made in that suit, on the 9th of July, 1819, which was amended by a further order of the 29th of July, 1825, it was referred to the Master to appoint a receiver of the outstanding debts and effects of the said firm ; and in case it should be necessary to put any of the debts in suit in England or Ireland, the same was to be done with the approbation of the Master, under which order the Respondent, John Stevenson Salt, was appointed receiver.

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No further proceedings were had in the two suits of *Jones v. Lord Donegal*, until the year 1824, when another supplemental bill was filed by Edward Houlditch and others, on behalf of themselves and the other debenture creditors of the Appellant against the Appellant, and the Respondents, James Dashwood, William M'George, and others; and a report was made by the Master, to whom the said several suits stood referred, dated the 11th of July, 1825, by which he certified that he had caused advertisements to be published in the London Gazette, and four of the London daily newspapers, for the owners of the said debenture, No. 26., to come in before him and make out their claim thereto, but that no claim had been made other than that of the said John Stevenson Salt, as such receiver as aforesaid; and he further found the principal sum of 3750*l.*, to be due on foot of the said debenture, No. 26.; and the sum of 4560*l.* 13*s.* 7*d.* for interest thereon, but that sufficient evidence had not been laid before him, as to the person or persons to whom the same belonged.

The cause coming on to be heard on the above report before the Vice-Chancellor, a decree was made on the 18th of June, 1827, directing that the creditors mentioned in the report should be paid out of the rents and profits of the trust estates, and that the Master should carry on the accounts directed by the original decree in *Jones v. Donegal*, against the trustees of the deed of the 20th of April, 1799, from the foot of the said report of 10th of August, 1804.

The bill, which was filed in the Court of Chancery in Ireland, with the sanction of the Master to whom the cause of *Anson v. Towgood*

stood referred, stated the matters herein-before set forth. It also stated an indenture of settlement, dated the 28th of October, 1822, by which the Appellant had charged the trust estates with the payment of 5000*l. per annum* to the Earl of Belfast, his eldest son, and a further sum of 1000*l. per annum* in case of his marriage in the life-time of the Appellant; and that the said Earl of Belfast had married shortly after the date of such settlement, and had received 6000*l. per annum* out of the said estates, and was then residing abroad; and that the Appellant had long been in the possession and receipt of the rents and profits of the trust estates, contrary to the trusts of the deed of the 20th of April, 1799, and was also in possession of the title deeds, the bill prayed that an account might be taken of what was due on the debentures No. 24. and No. 26.; and that the trusts of the said trust deed might be carried into execution; and that the Plaintiffs might be paid out of the surplus rents of the trust estates, subject to prior charges, if any, and to the payment of 10,000*l. per annum* to the Appellant; and that a receiver might be appointed, and the title deeds of the estates might be deposited; and by amendment, it prayed an account of all monies received by the Appellant or any other parties claiming by a title subsequent to the trust deed out of the trust estates; and also an account of what was due to the Appellant in respect of his annuity of 10,000*l.*; and that the receivers then in possession of part of the trust estates, as mentioned in the amended bill, might be ordered to pay their balances to the Respondents; and that the surplus, if any, received by the Appellant be-

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yond the sum of 10,000*l. per annum*, might be retained out of the trust estates by the trustees and their receiver, and that the Earl of Belfast and his trustees might be restrained from receiving any part of the rents and profits of the trust estates. It also prayed payment of the debentures.

The Appellant filed his answer to the bill on the 31st of January, 1827, by which he admitted the execution of the trust deed of April, 1799, and of the debentures No. 24. and No. 26., but he charged collusion between the trustees and Edward May, he insisted on the statute of limitations as a bar to the Plaintiff's claim, and also objected that the representative of Edward May was not before the Court. He stated, that in a paper writing, purporting to be a list of the debentures issued by the trustees, there was marked, in reference to debenture No. 26., in the hand-writing of William Lyon, one of the trustees, that the said debenture had been deposited with Messrs. Walwyn and Company; and that in another list there was marked, in reference to debenture No. 24., in the hand-writing of William Lyon, that the last-mentioned debenture had been assigned to Mr. Reeves, and a small sum advanced on it. He insisted throughout upon fraud, in obtaining the execution of the debentures; and although he referred to the Master's report, in *Jones v. Lord Donegal*, that sufficient evidence had not been offered to him as to the person to whom the debenture No. 26. belonged, yet he did not insist on such a finding as a bar to the present suit, but rested his defence on the statute of limitations, and the several alleged breaches of trust on the part of the trustees of the deed of



April, 1799. He admitted the deaths of May, Agnew, Lyon, and Burrowes; that two debts, of 9000*l.* and 30,000*l.*, prior to the trust deed, had been paid off; the settlement as to Lord Belfast; and the payment to him of 6000*l.* *per annum*, from the date of the settlement; and that he, the Appellant, had been in the receipt of a great part of the rents of the trust estates, and of fines for the renewal of leases, ever since the execution of the trust deed: and he stated that he believed the annual rental of the trust estates amounted to about 30,000*l.* He then set out several incumbrances affecting the said estates, and the names of creditors in possession of divers parts of them; and he admitted that he interfered, in 1803, to prevent the trustees from receiving the rents of the trust estates.

The Defendant M<sup>c</sup>George, filed his answer to the Bill on the 9th of July, 1827.

The Appellant filed his answer to the amended bill in July, 1829, by which he referred to the proceedings in the English suits, of *Jones v. Lord Donegal*, and *Houlditch v. Lord Donegal*, not as constituting any bar to the suit of the Respondents, but for the purpose of insisting that such suits and proceedings were not binding on the Appellant; he admitted the assignment of the Navigation shares to May, but stated that he could not recollect for what sum they were assigned, nor whether the Canal Company, who he believed obtained an assignment of them from May and Lord Spencer Chichester, had any notice of the trust deed of April, 1799.

The other parties to the suit having put in their

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answers, the Respondents went into evidence, deducing their title to the debenture No. 26., from the firm of Walwyn, Strange, and Company, and producing the evidence of Mr. Hanson, after submitting to pay the amount of a bill of costs, for which he claimed to have a lien on the copy of that debenture, and of its assignment.

In substance, Mr. Hanson deposed : — That, in the year 1800, he, and his partner Mr. Birch, were the solicitors for the firm of Walwyn, Strange, and Company ; and that on the 24th of December, 1800, John Agnew, one of the partners of the firm, sent the original debenture, No. 26., with the endorsement then on it, to the office of Messrs. Hanson and Birch, for the purpose of having it copied for a case about to be laid before the late Sir Samuel Romilly. A letter from John Agnew to Mr. Birch accompanied the debenture, and was in these words : —

“ Dear Sir, — I send you a debenture of Mr. May’s, which pray take care of, and let us have it again. We wish you could make it convenient to you to give us a call here to-day.

“ Yours truly, JOHN AGNEW.”

“ *Bond-street, 24th December.*

“ Send a receipt for D—re. Mention the number and sum.”

Mr. Hanson opened this letter in the absence of Mr. Birch, and on the same day wrote the following letter to Mr. Agnew : —

“ Sir, — My friend Birch set off this morning into Essex, and will not be back till the end of the week. I have received your letter, with the debenture to Mr. May, No. 26., dated 14th

" June, 1792, for 5000*l.* which shall be returned  
 " to you. I am, sir, your obedient servant,

" JOHN HANSON."

" *Chancery Lane, 24th Dec. 1800.*"

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He then immediately caused a copy of the debenture and its endorsement, to be made by his clerk, Peter Graham (who was dead). His clerk read over the original debenture and its indorsement to the deponent, who compared it with the copy; and the copy produced was that so made by Peter Graham, and did not differ from the original, except that the endorsement upon the original was copied at the foot of the copy of the debenture. " The deponent cannot recollect what became of the original, but thinks that it was returned to the said John Agnew, and diligent search has been made for it by him and his clerks without success. The deponent also says, that he was and is well acquainted with the writing of the said John Agnew and James Dashwood, and of Gabriel Tucker Steward, one of the subscribing witnesses to the execution of the debenture No. 26., by all the parties thereto; and that the names of the said several parties appearing on the said debenture, were of their respective handwriting."

Search had been made for the original debenture by all the parties into whose possession it could have come, but without success; and no person appeared to set up an adverse title.

The Respondents also offered in evidence, an affidavit of May, in the suit in England, admitting the assignment of the debenture for a valuable consideration, as appeared by the report of the 11th of July, 1825: the books of the two firms of Walwyn,

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Strange, and Company, and Strange, Dashwood, and Company, the entries being made by clerks, one of whom proved such as were in his own handwriting, and also proved the handwriting of the other entries which had been made by clerks since dead, or residing abroad, and their respective death or absence. The Defendant, M^cGeorge, was also examined at length by the Respondents, and cross-examined by the Appellant; but, at the hearing, the Appellant's counsel objected to the production of the books, and to the evidence of M^cGeorge, and the Court allowed the objections.

The cause was heard on the 19th and 20th of January, 1832, before the Lord Chancellor of Ireland, who pronounced a decree, by which it was referred to the Master to inquire and report the sum remaining due for principal and interest on the debenture, No. 26, in the pleadings mentioned; and it was declared, that, in taking such account, the Master was to consider the balance of the trust fund due by the trustees of the deed of the 20th of April, 1799, and in the hands of Messrs. Strange, Dashwood, Agnew, and Peacocke, on the 19th of July, 1803, as having been discharged, by being set off against the sum due on the debenture, No. 24., in the pleadings also mentioned. And the Master was to inquire and report to whom the sum that he should find to be due on said debenture, No. 26., was then due and payable, and the cause was to stand over for further directions until the return of the Master's report.

The Respondents carried their claim into the Master's office, under the above decree; and the Master made his report, bearing date the 23d of June, 1832, by which he certified that the sum of

9837*l.* 7*s.* 5*d.* was due for principal and interest to the above date on the said debenture, No. 26 ; and that the shares of Messrs. Dashwood, Agnew, and M'George, amounting to 6558*l.* 4*s.* 10*d.*, were then vested in and due to the Respondents, John Towgood and John Ingram, and payable to the Respondent, John Stephenson Salt, as such receiver as aforesaid ; but that he was unable to state to whom the shares of Messrs. Walwyn and Steward were due, but submitted whether the Respondents were not entitled to the whole amount due on the debenture in trust, as to the last-mentioned shares, for the persons beneficially entitled thereto.

The Respondents excepted to this report, on the ground that the Master should have found that the whole amount due on the debenture was payable to the receiver.

The Appellant also excepted to the report, and from the decree under which these proceedings were had in the Master's office.

The petition of appeal was against this report and the decree.

For the Appellant, Mr. *Knight* and Mr. *Rolfe*.

For the Respondents, the *Solicitor-General* and Mr. *Hull*.

For the Appellant.

Where a trust deed has been executed for the benefit of a class of creditors, it is not competent for a single creditor to maintain a bill in a court of equity for an account of his particular demand, under the trust deed, without seeking to give the other creditors the benefit of such proceedings,

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and to have the trusts of the deed carried into execution. *Hamilton v. Houghton*. *

The proceedings in the English suits of *Jones v. Donegal*, and *Houlditch v. Donegal*†, (whether erroneous or not) amounted to a bar against the Irish suit while unreversed.

The personal representatives of James Walwyn ought to have been before the Court, and also the assignees of William M^cGeorge, and also Gabriel Tucker Steward, inasmuch as they all had an interest in the sum claimed by the Respondents.

There was no sufficient proof of the debenture No. 26., or of the alleged assignment thereof to Messrs. Walwyn, Strange, Dashwood, M^cGeorge, Agnew, and Steward.

The Respondent, John Stevenson Salt, is merely the officer of the English Court of Chancery, and has no interest whatever enabling him to maintain a suit in respect of the debentures.

For the Respondents :

By the proceedings in the English suits of *Jones v. Lord Donegal*, and *Houlditch v. Lord Donegal* it has been clearly established, that, at the date of the Master's report, in July, 1825, the principal sum of £750*l.* was due on the debenture No. 26., and a sum of £560*l.* 13*s.* 7*d.* for interest ; and the Appellant has not attempted to show that any part of such principal or interest has been discharged.

The Respondents have proved, by evidence in this cause, which they were not able to produce at the time when the report in the English suits was made, that the debenture No. 26., was sent, in December, 1800, by one of the firm of Strange, Dashwood, and Company, through whom the Re-

* 2 Bligh, O. S. 169.

† 8 Bligh, N. S. 301.

spondents claim to the solicitor of the firm, accompanied by a letter requesting that it might be returned; that by an endorsement the debenture was assigned to the firm of Walwyn, Strange, Dashwood, and Company; that the solicitor caused a copy to be made of the debenture and its assignment, which he has produced and proved in the cause; and that repeated searches have been made by every party into whose possession the debenture could have come, but it has not been found.

No other person has appeared to claim the debenture, notwithstanding the advertisements published under the direction of the Court in the English suit.

The representative of Edward May, the original creditor, to whom the debenture was granted, and who assigned it to Walwyn, Strange, and Company, does not claim any interest in the security; and it is not pretended that the sum secured has been paid. There are no adverse claimants, but the Appellant's object is to relieve himself from the payment of a just debt.

After the argument, the case stood over for judgment, and on the 12th of August the decree was affirmed without further observation.

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(COURT OF KING'S BENCH.)

JOSE VENTURA DE AGUIRRE
SOLARTE, THOMAS ABEL,
and ANSELMO DE ARRO-
YAVE, Assignees, &c. of } *Plaintiffs in Error.*
JOAQUIM RUEZ DE AL-
ZEDO, a Bankrupt - - }

JOHN ARCHDALE PALMER, } *Defendants in Error.*
and WILLIAM BOUCH - }

Upon the dishonour of a bill of exchange by the acceptor, a letter was written to the indorsers in the following terms:—
“ A bill for 683*l.*, drawn by J. upon D. & Co., and bearing
“ your indorsement, has been put into our hands by the
“ assignees of A.” (the holder, who had become bankrupt),
“ with directions to take legal measures for the recovery
“ thereof unless immediately paid.”

Held, upon a bill of exceptions to the direction of the judge, upon the trial of an action against the indorser to recover the amount of the bill, that this was not a sufficient notice of the dishonour and non-payment of the bill to entitle the plaintiffs to maintain their action.

THIS was a writ of error brought by the Plaintiffs upon a judgment of the Exchequer Chamber, affirming a judgment in the Court of King's Bench, in favour of the Defendants below.

The action was brought by the Plaintiffs, as assignees of Joaquim Ruez de Alzedo, a bankrupt, against the Defendants, as indorsers of a bill of exchange. The declaration, after setting forth

two sets of money counts, one alleging a debt to be due to the bankrupt and promises to him, and the other alleging a debt to be due to the Plaintiffs as assignees, and promises to them, upon which no question arises, and upon which no evidence was given at the trial, stated, that one Joseph Keats, before the said Joaquim Ruez de Alzedo became a bankrupt, to wit, on the 12th of April, 1825, according to the custom of merchants, made his certain bill of exchange, bearing date the day and year last aforesaid, and thereby requested Messrs. Daniel Jones and Co., eight months after the date thereof, to pay to the order of him, the said Joseph Keats, the sum of 683*l*. value received. That the said Messrs. Daniel Jones and Co. afterwards, and before the said Joaquim Ruez de Alzedo became bankrupt, accepted the said bill, and then and there made the same payable at Messrs. Williams, Burgess, and Williams's. That the said Joseph Keats, to whose order the payment of the said sum of money, in the said bill named, was to be made, indorsed the same to the said Defendants, and that the said Defendants indorsed the same to Joaquim Ruez de Alzedo, before he became bankrupt.

The Plaintiffs then averred that, after the said Joaquim Ruez de Alzedo became bankrupt, the said bill was duly presented at the said Messrs. Williams, Burgess, and Williams's, for payment thereof, according to the custom of merchants, and the tenor of the bill, and the said acceptance thereof, and that payment was required, but that neither Messrs. Daniel Jones and Co., nor the said Messrs. Williams, Burgess, and Williams, would pay the same, but refused so to do. That of all the said several promises the said Defendants had notice; by means whereof the said Defendants

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became liable to pay to the said Plaintiffs the said sum of money in the said bill specified, upon request. That being so liable, the said Defendants promised to pay when requested. There was a second count on the bill of exchange, omitting the acceptance and the presentment to Messrs. Williams, Burgess, and Williams.

The Defendants pleaded the general issue.

The cause came on for trial at the London Sittings, after Hilary Term 1828, before the Right Honourable Lord Tenterden, Lord Chief Justice of the King's Bench, and a special jury. The bankruptcy of Joaquin Ruez de Alzedo, and the appointment of the Plaintiffs as his assignees, were admitted by the Defendants, and also the drawing, acceptance, and indorsement of the bill. The Plaintiffs then proved that the bill was duly presented for payment at Messrs. Williams, Burgess, and Williams's, on the 15th of December, the day on which it became due; that payment was refused; that the bill was returned to the Plaintiffs for non-payment on the 16th of December; that on the 17th of December, Messrs. J. and S. Pearce, the attorneys for the Plaintiffs, wrote the following letter to the Defendants:—

"GENTLEMEN,

17th Dec. 1825.

"A bill for 683*l*., drawn by Mr. Joseph Keats
"upon Messrs. Daniel Jones and Co., and bearing
"your indorsement, has been put into our hands
"by the assignees of Mr. J. R. de Alzedo, with
"directions to take legal measures for the recovery
"thereof, unless immediately paid to. Gentlemen,
"your very obedient servants, J. & S. PEARCE."
Addressed— "Messrs. Palmer and Bouch."

Which letter was, on the 17th of December, received by the Defendants.

The Lord Chief Justice delivered his opinion to the jury, that the letter above set forth was not a sufficient notice of the dishonour and non-payment of the bill of exchange, to entitle the Plaintiffs to maintain and support the action against the Defendants; and with that direction left the same to the jury, who found a verdict for the Defendants. The counsel for the Plaintiffs tendered a bill of exceptions to the opinion of the Lord Chief Justice.

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Judgment having been given for the Defendants in the Court of King's Bench, a writ of error was brought in the Exchequer Chamber, and special errors were assigned, which, in Easter Term 1831, were argued before the judges of the Courts of Common Pleas and the Exchequer, when the judgment of the Court of King's Bench was affirmed.*

Upon this judgment the Plaintiffs brought their writ of error in Parliament, and assigned several special errors; in substance alleging that the opinion, given by the Lord Chief Justice to the jury upon the trial was wrong, and that the letter written and sent by Messrs. J. and S. Pearce to the Defendants, was a sufficient notice of the dishonour and nonpayment of the bill of exchange, to entitle the Plaintiffs to maintain and support the said action.

The case was heard in the presence of the judges.

For the Appellants, Mr. *F. Pollock* and Mr. *R. V. Richards*.

The authority of the decision in *Hartley v. Case*, on which this judgment proceeded, has been questioned; and Lord Tenterden thought that the

* 7 Bing. 520.

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doctrine of that case on which he relied, might properly be investigated here. No prescribed form of notice is necessary to make the indorser of a bill liable. *Tindal v. Brown*.* The letter in this case, threatening legal proceedings if the bill were not paid, clearly imported that the holder expected payment from the indorser. This, in substance and common sense, is a notification that the bill has been dishonoured.

For the Defendants in error *Mr. Whateley* was not heard †; the reasons assigned in the printed case are as follows: —

First. It is essential that a notice of the dishonour of a bill of exchange should inform the party to whom it is addressed, what the bill is; that payment of it has been refused by the acceptor; and that the holder looks to the party to whom notice is given, for payment of the amount.

Secondly. The notice in the present case does not state that the bill had ever been accepted, nor that the bill had ever been dishonoured; nor that the party giving the notice, looked to the party to whom it was addressed for payment of it, on the ground of such dishonour, nor even that the bill was due.

Thirdly. It is perfectly consistent with this notice that the bill had never been presented to the acceptor at all, and that the Plaintiffs meant to rely upon some legal excuse for the non-presentment.

Fourthly. This notice does not support the necessary allegation contained in the declaration, that

* 7 T. R. 187.; Bayley on Bills, 4th Ed. 206.

† A question was put to the judges as to the sufficiency of the notice of dishonour, &c., and their opinion (delivered by Park J.) was unanimous in the negative.

the bill had been presented to the acceptor, who had refused payment, whereof the Defendants had notice.

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The *Lord Chancellor*.—This is a writ of error from the Exchequer Chamber which never ought to have been here. Upon known principles of law and settled authorities no case can be more free from doubt. The question is, Whether or not a letter addressed to the indorser of a bill of exchange, demanding payment and threatening process, amounts to notice of dishonour by the acceptors. Upon this point a question has been put to the judges, and they have given their opinion that it is not a valid notice of dishonour. The point having been settled by former decision, I doubted if it was right to give the judges the trouble of attending upon such a question. (Here the Lord Chancellor read the letter.) I hold this to be no notice of dishonour; it is a mere demand for payment made upon the indorser, and threat of process; and it is clear in point of law, upon settled authorities, that a mere demand of payment does not amount to a notice of dishonour: upon this lawyers, merchants, and notaries act daily. It might seem superfluous to refer to authorities; but when the contrary position is maintained at length before this House, it becomes necessary to see whether the authorities relied on justify the argument. The authorities cited are, *Tindal v. Brown*, 1 Term Rep. 167., and *Bayley on Bills*, p. 206. 4th edit. The case is not an authority for the doctrine of the Plaintiff's counsel; and it is remarkable that those who signed the printed

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case should not have looked to the authority of *Hartley v. Case*,* the principle of which decision is precisely applicable to this case, and the letter all but identical in its terms. The letter there was, "I am desired to apply to you for the payment of "150*l.* due to myself, on a draft by Mr. Case on "Mr. Case, which I hope you will on receipt discharge, to prevent the necessity of law proceedings, which otherwise will immediately take "place." The Chief Justice, on the application to set aside the nonsuit, says, "There is no precise form of words necessary to be used in giving "notice of the dishonour of a bill of exchange; "but the language used must be such as to convey "notice to the party what the bill is, and that payment of it has been refused by the acceptor. Here "the letter in question did not convey to the Defendant any such notice." And upon this ground the rule was discharged: yet the letter in that case is, if any thing, more explicit than the letter now in question. The other authority quoted for the Plaintiffs is *Bayley on Bills*—the fourth edition. If the fifth edition had been referred to, at p. 257, the doctrine would have been found to be thus "stated: "The notice ought to import that the bill "has been dishonoured: a mere demand of payment and threat of law proceedings in case of non-payment is not sufficient." Now *Hartley v. Case* was not decided when the fourth edition of *Bayley* was published. After that decision expressly upon the point, it ought not to be argued by counsel, that a threat of process is sufficient, upon the ground that it shows by inference that a default in

* 4 B. & C. 399.

the acceptor must have been committed. Where the law is clear and settled, writs of error should not be brought to this House. If such a practice were encouraged, the Court of Appeal would be converted into an instrument of oppression. The House ought to mark its disapprobation of such proceedings by giving to the Defendant in error full costs.

Judgment affirmed, with full costs.

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ENGLAND.

(COURT OF EXCHEQUER.)

ROGER HOLDSWORTH, JOHN ROB-
SON, ROBERT S. THOMPSON, and } *Appellants;*
WILLIAM WRIGHT - - - }

THOMAS LODINGTON FAIRFAX and
the Reverend BENJAMIN EAMON- } *Respondents.*
SON, Clerk - - - }

Under the powers created by the statute 17 Cha. 2. c. 3., F., by his will dated in 1671, gave all the tithes of hay, corn, grain, and all other tithes, great and small, of the parish of B., to H. F., his heirs, &c., to the use of a preaching minister, to be nominated by H. F. and his heirs. In 1706, T. F., the descendant and heir of H. F., conveyed the tithes, with other hereditaments, in trust for the payment of creditors; and, upon a bill in equity filed by the creditors, they were sold under a decree of the Court, and in 1716 conveyed to R. F. and J. H. (a trustee for R. F.), and their heirs, &c. in trust, as to the tithes of B., to the use of a preaching minister to be nominated by R. F. and his heirs. J. H. survived R. F. and became seized of the legal estate, and his descendant and heir in 1826 conveyed the tithes of B., &c. to T. L. F., the heir of T. F. upon the original trusts. Before this conveyance (in 1821), T. L. F., who then had the equitable estate in the tithes of B., appointed E. the preaching minister of B.

Held, upon a bill in equity by T. L. F. and E., against occupiers of lands in B., for an account of tithes, that the title derived under the will of F., and the decree of sale for payment of debts, was good in equity, and the appointment made by T. L. F., before he had the legal estate, valid: Held, also, under the circumstances stated in the following report, that the tithes of corn and hay were due, except as to certain farms covered by a modus.

THE Respondents, in Easter Term, 1826, exhibited their bill of complaint against the Appellants, and Matthew Todd (since deceased), Henry

Dotchen, and John Powell, thereby stating that Thomas Lord Fairfax being, at the time of making the codicil therein after mentioned, and thenceforth to the time of his death, seised or otherwise well entitled, for an estate of inheritance in fee simple, of or to all the tithes of corn, grain, and hay, and all other tithes whatsoever, great and small, arising, growing, and renewing within the parish of Bilborough* and the titheable places thereof, duly made and executed a codicil to his last will, in such manner as the law requires for rendering valid devises of freehold estates, which codicil was dated the 11th of November, 1671, and thereby gave to Richard Stretton, his domestic chaplain, all his tithes of Bilborough and of Sandwash, in the county of York, for the term of threescore years, if Richard Stretton should so long live, provided he supplied the office of preaching minister there, or procured one to do it; and the remainder in fee of the said tithes he gave to Henry Fairfax, of Oglethorp, therein named, and his heirs and assigns for ever, to the use and behoof of a preaching minister, there to be nominated by the said Henry Fairfax and his heirs for ever; and that the said testator shortly afterwards died, without having altered or revoked his said codicil, and thereupon the said Henry Fairfax (who, by the death of Thomas Lord Fairfax without issue male, became Lord Fairfax), became seised of the said tithes and premises, subject to the said estate therein of the said Richard Stretton, and continued so seised to the time of his decease, and afterwards died intestate as to the said tithes and premises; and that the same thereupon descended to his eldest son and heir-at-law

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Thomas Lord Fairfax, who died so seised thereof to the uses aforesaid; whereupon the same descended to his eldest son and heir-at-law Thomas Lord Fairfax, who, being so seised thereof to the uses aforesaid by indentures of lease and release, bearing date respectively the 13th and 14th of July, 1716, for the considerations therein mentioned, did grant and convey to Robert Fairfax (the great grandfather of the Respondent), Thomas Lodington Fairfax, and John Hardwick, their heirs and assigns, (amongst other hereditaments,) all the said tithes of Bilborough and of Sandwish, otherwise Sandwash, and the advowson or patronage, donation, and nomination of a preaching minister to the parish church of Bilborough aforesaid, to hold unto and to the use of the said grantees, their heirs and assigns for ever, in trust, nevertheless, as to the said tithes of Bilborough and Sandwish aforesaid, to the use and behoof of a preaching minister, there to be nominated by the said Robert Fairfax and his heirs; and that afterwards by an indenture, dated the 18th of March, 1716 (in which the said last-mentioned indentures of lease and release were recited), the said John Hardwick did acknowledge the consideration thereof to have been paid by the said Robert Fairfax out of his own monies, and that the name of the said John Hardwick was used therein in trust only for the said Robert Fairfax and his heirs; and the said John Hardwick covenanted to convey the premises therein mentioned accordingly, so as such conveyances and assurances for and concerning the said tithes should be to the use of a preaching minister, there to be nominated by the said Robert Fairfax and his heirs; and that the said Robert Fairfax died in or about the year

1725, leaving the said John Hardwick living; and that the legal estate of the said land and premises became solely vested in the said John Hardwick; and that by divers mesne conveyances and assurances and other acts in the law, and particularly by indentures of lease and release, respectively the 19th and 20th March, 1725, a release being made between William Parkins, who was the eldest son and heir-at-law of the said John Parkins and Catherine his wife, the great granddaughter and heiress-at-law of the said John Hardwick, of the first part, the Respondent Thomas Lodington Fairfax, of the second part, and Jonathan Gutterman, of the third part, for the consideration therein mentioned (amongst and together with other things), the said tithes of Bilborough and Sandwish, otherwise Sandwash, were conveyed by the said William Parkins unto the Respondent Thomas Lodington Fairfax, his heirs and assigns for ever, upon the same trusts, nevertheless the said tithes of Bilborough and Sandwish, otherwise Sandwash, as the said William Parkins had and lawfully enjoyed the same, and as were mentioned in the said part stated indenture of release, of the 19th July, 1716; and that the said advowson or right of presentation, donation and nomination, of a parson or minister to the parish church of Bilborough at Bilborough, previously to the year 1821, descended upon the said John Hardwick and became and was then vested in the Respondent Thomas Lodington Fairfax, the heir-at-law of the said John Hardwick; and that the Respondent Benjamin Eamonson then was, and had been the minister of the said church, to which he was, in the said year 1821, duly nominated by the said Respondent

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Lodington Fairfax, and licensed by the Archbishop of York, and had ever since officiated in the said church as minister thereof, by performing service therein; and, during all the time aforesaid, the Respondent Benjamin Eamonson had been and then was entitled under the trust aforesaid to receive all and every the tithes arising, growing, and renewing within the said parish of Bilborough, and the titheable places thereof; and that all the said Defendants then were, and ever since, and also long previously to the appointment of the Respondent Benjamin Eamonson as minister as aforesaid, had been respectively the occupiers of divers farms, lands, and tenements in the said parish of Bilborough, consisting respectively of many acres of arable, pasture, and meadow lands; and that certain payments, by composition or agreement, had, at times, been accepted and taken by the predecessors of the Respondent Benjamin Eamonson, the former ministers of the said church, or some of them, from the occupiers for the time being of the said several farms, lands, and tenements in satisfaction of the tithes thereof; and that the Reverend Thomas Lambe, the immediate predecessor of the Respondent Benjamin Eamonson, and who was for many years the preaching minister of the said church, accepted and received from such occupiers respectively a composition of *5s. per acre*, in satisfaction of the tithes thereof; and that the Respondent Benjamin Eamonson, on being nominated and appointed minister as aforesaid, accepted and received a similar payment of *5s.* for every acre of their said farms, lands, and tenements, in lieu of the tithes thereof, from the said Defendants respectively, until the respective times therein-after

mentioned; namely, from the said Roger Holdsworth, until some time in the month of June, 1823, when such composition was dissolved, or put an end to, as between the Respondent Benjamin Eamonson and the said Roger Holdsworth, by the mutual consent of both parties, and from the said John Robson, Matthew Todd, Henry Dotchen, Robert Stephen Thompson, William Wright, and John Powell respectively, until Michaelmas, 1824, when the said composition, as between the said Benjamin Eamonson and each of the said last-named Defendants, was put an end to and determined by virtue and in consequence of notices in writing, respectively, signed by the Respondent Benjamin Eamonson, and respectively dated the 10th of March, 1824, as therein mentioned; and that the Appellants and the said other Defendants had had such titheable matters on and from their said farms and lands as therein mentioned; and it was by the said bill charged that the said farms, lands, and tenements, so occupied by the Defendants respectively, belonged to the said testator Thomas Lord Fairfax, at the time of the date of the said codicil, together with almost all the remaining lands in the said parish of Bilbrough; and that the occupiers, for the time being, ever since the death of the said testator, of the several farms, lands, and tenements so occupied by the said Defendants as aforesaid, had respectively, in each and every year, paid or satisfied the said tithes of the titheable matters or things had by them respectively therefrom to the preaching minister of the said parish church, for the time being, nominated and appointed by the said Henry Fairfax, and those claiming under him; but that,

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in general the tithes of the said lands and tenements had not been paid or taken in kind, but a composition or money payment in lieu thereof had been agreed upon between the said occupiers for the time being and the said preaching minister, and was paid and satisfied to such preaching minister.

Then followed a statement of a suit, (*Fairfax v. Wright*) in 1779, against a former occupier, and a decree, in 1784, for an account of tithes of Bilborough.

The bill then further charged that all and every the lands and tenements, which were at the time of the said suit in the occupation of the Defendant to that suit, were then, and for some time previously had been, in the occupation of the said Roger Holdsworth, Henry Dotchen, and William Wright, or some of them, or of some of the Defendants thereto; and that no other person or persons than the Respondent Benjamin Eamonson claimed or was entitled to the tithes of the lands occupied by the said Defendants respectively, or of any of such tithes; and that the Defendants had not, nor had any of them, paid or satisfied all or any of the tithes of the several titheable matters and things had by them respectively, on and from their said lands, to any other person than the Respondent Benjamin Eamonson since he became such minister; and that the several Defendants to the said bill of the said Respondents paid to the Respondent Benjamin Eamonson and his predecessor the annual composition of 5s. for every acre of land, in lieu of the tithes of all the titheable matters and things had and taken by them respectively from and off such lands, and not in lieu of the tithes of corn only; and the composition was paid

by the Defendants respectively for every acre of land in their respective occupation, in each year, whether they grew much or little corn, or no corn at all, thereon, save and except that the Defendants, or some of them, claimed and had a deduction allowed to them in respect of such part of their or some of their lands as consisted of plantations and roads, and which they alleged, as the fact was, produced no titheable matters or things at all.

The bill prayed that the Defendants might be decreed to come to a fair and just account with the Respondents for the value of the tithes of all and every the titheable matters and things, except corn, had and taken by them respectively from the lands in their respective occupations; and might respectively pay to the Respondent Benjamin Eamondson what, upon taking such account, should appear to be due to him, the Respondents thereby waving all pains and penalties which had been incurred by the Defendants for subtracting or not setting out such tithes, or any of them.

To this bill the Appellant Roger Holdsworth filed his answer on the 3d of May, 1827, and thereby, amongst other things, stated —

That he believed that the Respondent Benjamin Eamondson had, ever since 1821, officiated as minister in the church at Bilbrough, by performing divine service therein once only on each Sunday, and that such service was generally performed only in the afternoon; and the Appellant submitted that the said Respondent Thomas Lodington Fairfax had not a right to nominate the said Respondent Benjamin Eamondson as minister of the said church at Bilbrough; and that the said Respondent Benjamin Eamondson was not duly nominated

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thereto, and that he had not been and was not then entitled, under the trust in the said bill mentioned, or in any other manner, to receive all and every the tithes arising, growing, and renewing within the township of Bilbrough, and the titheable places thereof, or any part thereof. And the Appellant submitted that if it should appear to this Court that the said Respondent Benjamin Eamonson was duly nominated to be minister of the said church, yet that as such minister he would be entitled only to the tithes of corn and grain arising, growing, and renewing within the said township of Bilbrough.

The Defendant by the answer then contended that payments had been made by way of composition. He then put forth the substance of an agreement between Thomas Lambe, the predecessor of Eamonson, and William Agar by way of composition respecting the tithes; but that it was thereby agreed between the parties thereto, that the said agreement should not be construed or taken in any manner to ascertain or specify what tithes the said Thomas Lambe was entitled to in Bilbrough; the said Thomas Lambe insisting that he was entitled to all tithes, both great and small, arising on the lands in Bilbrough aforesaid; and the said William Agar insisting that the said Thomas Lambe was entitled only to the tithes of corn arising on the lands in Bilbrough aforesaid, or to some such purport or effect. That a great part of the land in the occupation of the Appellant Roger Holdsworth was part of the estate of the said William Agar, which was included in the said agreement; and during the time that he the Appellant occupied such land, in the life time of the said Thomas

Lambe, the last named Appellant, in respect of such land, paid a portion of the said yearly rent, agreed to be paid by the said William Agar to the said Thomas Lambe. But he denied that Benjamin Eamondson, on being nominated and appointed minister, accepted and received a similar payment for every acre of the farms, lands, and tenements in his occupation, in lieu of the tithes of corn and grain thereof, from the last named Appellant, until the time in the said bill in that behalf mentioned; on the contrary, the said Respondent Benjamin Eamondson demanded from the Appellant Roger Holdsworth larger sums than he had paid to the said Thomas Lambe: that believing the Respondent Benjamin Eamondson had been duly appointed minister, he made some payments to him; and that the payments made by him, by way of composition or agreement, were all intended to be in lieu of the tithes of corn and grain only, and not in lieu of any other tithes, because he was informed and believed that the minister was not entitled to any other tithes.

That in the month of June, 1823, the composition was dissolved by mutual consent; and that in each year since the month of June, 1823, he had applied the whole of the titheable matters and things, growing upon his lands in Bilbrough, to his own use and benefit, without paying the tithes thereof, save the tithes of corn and grain, which he set forth for the use of the Respondent Benjamin Eamondson, believing at that time that he, Benjamin Eamondson, had been duly nominated minister of the said church.

That he believed that all the tithes of his said farms and lands, except the tithes of corn and

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grain, either belonged to the owner of such farms, lands, and tenements respectively, or that the said lands were by composition real, or by other lawful ways and means, freed, exempted, or discharged from the payment of tithes, except the tithes of corn and grain; and he said that he had occupied some of the lands which were in his possession upwards of 38 years, and the other lands in his occupation he had occupied for various periods of 20, 16, and 7 years, or thereabouts, and that he, the said last-named Appellant, had not, during any part of such time, paid any tithes, except the tithes of corn and grain, to the Respondent, or to the said Thomas Lambe, or any other minister of the church; and he believed that no former occupier of the lands occupied by him, nor any other occupier of lands within the said township, had, in the memory of any person then living, paid any tithes, except the tithes of corn and grain, to the minister of the said church; and he said that he was the owner of all the lands in his occupation, and that he, and, as he believed, the several persons under whom he claimed the said lands, had retained for their use and benefit, as far as human memory extended, the tithes of all titheable matters which had arisen on the said lands, except the tithes of corn and grain; and that the several occupiers of lands in the said township, during all such time, had retained for their own use and benefit the tithes of all titheable matters which had arisen on the lands in their respective occupations; and he submitted that after such length of possession of the said tithes by him, the last-named Appellant, and those under whom he claimed, the Respondents were not, nor were either of them, entitled to any relief against

the last-named Appellant in equity, until they should have established their title at law to the tithes demanded by the said bill, except the tithes of corn and grain.

That he believed that no part of the said lands and tenements, which were at the time of the suit (*Fairfax v. Wright*) in the occupation of Christopher Wright, was ever occupied by the Appellant; and said that he claimed to retain for his own benefit the tithes of all the titheable matters arising on the lands occupied by him.

He admitted that he did pay to Thomas Lambe, and to Benjamin Eamondson, believing that he had been duly admitted minister of the said church, an annual composition of all the tithes to which they were entitled, being, as the said Appellant R. Holdsworth submitted, only the tithes of corn and grain; but that the Appellant did not otherwise pay a composition for every acre of land in his occupation in each year, whether he grew much or little corn, or no corn at all, thereon.

He submitted that it appeared by the Respondent's own showing, by the said bill, that the Respondent Thomas Lodington Fairfax was not the person named, or described, or entitled, under the will of the testator Thomas Lord Fairfax as a trustee to nominate a preaching minister for the church of Bilbrough; and that at the time that it was alleged by the said bill that he nominated the said Respondent B. Eamondson to be minister, and for many years afterwards, he had not any legal estate in the tithes alleged by the said bill to be devised by the will of the said Thomas Lord Fairfax; and that if the power of nominating a minister were conveyed by the conveyances in the bill men-

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tioned, that such power was not vested in the said Respondent Thomas Lodington Fairfax at the time that it was by the said bill alleged that he nominated the said Respondent B. Eamondson to be minister.

The Appellant John Robson, and Matthew Todd, and Henry Dotchen, and the Appellants Robert Stephen Thompson, and William Wright, and John Powell, also put in their joint and several answer to the bill.

The cause was heard on the 15th, 16th, 17th, 18th, 19th, and 21st days of December, 1829; and, on the 11th of November, 1830, a decree was made to take an account of all and every the titheable matters and things, except corn, had and taken by the Appellants, and Matthew Todd, Henry Dotchen, and John Powell, from the lands in their respective occupations within the parish of Bilbrough, except the lands, &c. And in taking the account the Master was to make to all parties all just allowances; and the usual directions were given for the production of deeds, books, papers, and writings, and the examination of parties and witnesses; and it was ordered that the Appellants, and the said Matthew Todd, Henry Dotchen, and John Powell, should severally pay to Benjamin Eamondson what the Master should upon taking the account find to be due from them respectively, for the value of the tithes of the titheable matters and things, except corn, had and taken by them respectively from the lands in their occupation, within the said parish of Bilbrough.

The Respondents, in their answer to a cross-bill filed against them by Roger Holdsworth, admitted that Thomas Lodington Fairfax was not the heir-

at-law of Henry Fairfax, and that he did not claim the tithes through any consanguinity between him and Henry Fairfax, and they believed that the heir of Henry Fairfax was Lord Fairfax, who then resided in America.

The answer and deeds, produced as evidence by the Respondents, proved, that Henry Fairfax left his eldest son, who was afterwards Thomas Lord Fairfax, his heir-at-law; that the said tithes and right of nominating a preaching minister descended upon him; and that he, by an indenture, dated 4th September, 1706, for the better securing the payment of the several sums to the respective creditors, in a schedule thereunto annexed, which amounted to 16,695*l.* 15*s.*, conveyed to trustees all his lands, tenements, tithes, rents, and hereditaments, upon trust by mortgage or sale to raise money for paying certain debts therein mentioned.

That Thomas Lord Fairfax, party to such deed, died, having made his will, by which he devised his real and personal estates in trust for the payment of his debts; and after his death Gerard Bothomley and others, who were his creditors, filed their bill in Chancery against the surviving trustees, under the last-mentioned deed and will, and against his eldest son and heir-at-law, who had then become Thomas Lord Fairfax, to compel a sale of the trust estates for the payment of their debts. That a sale was decreed; and at such sale Robert Fairfax, under whom the Respondent Thomas Lodington Fairfax claims, was the best bidder for and purchaser of part of the hereditaments; and that by indentures of lease and release, dated the 13th and 14th of July, 1716, the parties of the first part did grant and release to Robert Fairfax and John

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Hardwicke (by the special direction and appointment of Robert Fairfax), their heirs and assignees, the manors, or reputed manors, of Bilbrough and Sandwith, alias Sandwath, and the whole estate there, as, therein particularly described, and also the tithes of Bilbrough and Sandwith, and the advowson or patronage, donation, and nomination of a preaching minister or curate of the parish church of Bilbrough aforesaid, and all other messuages, lands, tenements, tithes, obventions, oblations, and hereditaments, &c., within the manors, or reputed manors, of Bilbrough and Sandwith; in trust, nevertheless, as to the tithes of Bilbrough and Sandwith, to the use and behoof of a preaching minister, there to be nominated by Robert Fairfax and his heirs :

That Robert Fairfax died in the lifetime of John Hardwicke; and thereupon all the estates, hereditaments, and premises which were conveyed to Robert Fairfax and John Hardwicke became vested in John Hardwicke as the survivor, and continued to be vested in him and his heirs until the 21st of March, 1826, which was between four and five years after the time that the Respondent Thomas Lodington Fairfax nominated the other Respondent to be the preaching minister of Bilbrough :

That by indentures of lease and release, which are dated the 20th and 21st of March, 1826, William Parkins, the heir-at-law of John Hardwicke, conveyed to the Respondent Thomas Lodington Fairfax the estates, hereditaments, and premises which were conveyed to Robert Fairfax and John Hardwicke by the indentures of the 14th of July, 1716, upon the same trusts, nevertheless, as to the

tithes of Bilbrough and Sandwith, as William Parkins held the same, and as particularly mentioned in the indenture of the 14th of July, 1716.

That the grant of tithes in Bilbrough and Sandwith, which was produced in this cause on the behalf of the Respondents, and under which they alleged that the first Thomas Lord Fairfax became entitled to the tithes, devised by the codicil to his will, was a grant made by King Edward VI., by letters patent in the 7th year of his reign, to John Wright and Thomas Holmes; which grant was of
 “all those our tithes of corn, grain, blades, hay,
 “wool, and lambs, and all our tithes whatever,
 “annually, and from time to time, growing, coming,
 “and renewing in Drynghouses, Knapton, and
 “Bilburgh, in the county of the city of York, then
 “or lately in the tenure of Sir Leonard Beckwith,
 “Knight, to the late priory of the Holy Trinity,
 “within the said city of York, formerly belonging
 “and appertaining.”

That the lease to Sir Leonard Beckwith, by which he held the tithes which belonged to the late priory of the Holy Trinity, was from King Henry VIII., and bears date the 5th of July, in the 28th year of his reign; and by it he demised to Leonard Beckwith, Gent., all the tithes of corn and hay of Drynghouses, Knapton, and Bilburgh, and also all the tithes of certain closes within the lordship of Sandwith, also all oblations within the parish church of St. Nicholas in York, together with a close called Moscarre, otherwise Moscroft, which then lately belonged to the late priory of the Holy Trinity in York, which was suppressed and dissolved by the authority of parliament; to hold all the said premises, to the said Leonard Beckwith

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and his assigns, for 21 years from the feast of the Annunciation of the blessed Virgin Mary, then last, paying yearly to the said Lord the King, his heirs and successors, 15*l.* 5*s.* 10½*d.*: namely, for the tithes of corn and hay of Drynghouses, 40*s.*; for the tithes of corn and hay at Knapton, 60*s.*; and for the tithes of corn and hay of Bilburch, 6*l.* 10*s.*; and for the tithes of the aforesaid closes, within the lordship of Sandwith, 30*s.*; and for the oblations within the parish of St. Nicholas, 19*s.* 2½*d.*; and for the aforesaid close of land, called Moscarre close, 26*s.*:

That the accounts of ministers or collectors of the rents belonging to the crown, arising from the possessions which belonged to the said priory of the Trinity, for the 29th year of the reign of King Henry VIII., and for several years afterwards, were produced, in all of which the ministers or collectors stated that they received 13*l.*; for the farm of the tithes of corn of Drynghouses, 40*s.*, Knapton, 60*s.*, Bilburch, 6*l.* 10*s.*, and of certain closes, 30*s.*, within the lordship of Sandwith, late in the hands of the late prior and convent, and then in the tenure of the said Sir Leonard Beckwith.

The bill of particulars by which John Wright and Thomas Holmes applied to purchase, and purchased, the tithes of Bilbrough from King Edward VI., and in consequence of which the letters patent to John Wright and Thomas Holmes were made, was as follows:—

This bill, made the 14th of March, in the 7th year of the reign of our sovereign lord Edward VI., by the grace of God, King of England, France, and Ireland, Defender of the Faith, and of the Church of England and Ireland, in earth, the

supreme head, witnesseth, that we, John Wright and Thomas Holmes, do require to purchase of the King's Majesty the messuage, lands, tenements, and hereditaments contained and specified in the particulars and rates hereunto annexed, being of such clear yearly value as in the same particulars and rates is expressed. In witness whereof, to this present bill, we have subscribed our names and put our seals the day and year aforesaid.

County of York. — Parcel of the possessions of the priory of the Holy Trinity within the city of York. Tithes of Drynghouses, Knapton, and Bilborough, in the said county of York, are valued in the farm of the tithes of Drynghouses, 40s., Knapton, 60s., and Bilbourghe, 6l. 10s., late in the hands of the late prior and convent of the late priory aforesaid, so demised to Sir Leonard Beckwith, Knight, by indenture as it is said, rendering therefore at the times of St. Martin in the winter and Pentecost equally, by the year.

£ s.
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17th January, in the 6th year of King Edward VI., for John Wright, servant of Sir Robert Bowes, Knt.

The King's Majesty to discharge the purchaser of all incumbrances, except leases with the covenants thereof.

The tenure in socage.

The purchaser to have the issues from Michaelmas last past.

The advowsons of the vicarages aforesaid to be excepted from the purchaser, if any such be.

Terriers of Bilbrough were also produced, dated in the years 1716, 1743, and 1748, in all of which

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the devise by the codicil of the first Thomas Lord Fairfax was stated, and in all of which it was also stated that Bilbrough was a curacy that had no dwelling-house, nor offerings, nor petty tithes, nor glebe-land, belonging to it, but a small church-yard, which was let for 2s. 6d. yearly.

The appeal was against the decree*, except as to the dismissal of the bill respecting the tithes of land called Moscars, &c.

For the Appellants, Mr. *Agar* and Mr. *Koe*.

For the Respondents, Mr. *Simkinson* and Mr. *Duckworth*.

For the Appellants.

The devise by the codicil of Thomas Lord Fairfax, in 1671, of his tithes in Bilborough and Sandwith to the use and behoof of a preaching minister there, to be nominated by Henry Fairfax and his heirs, is a charitable trust, to be executed by Henry Fairfax and his heirs only†; such trust of the tithes, and the right of nomination of a preaching minister, were not saleable by him or his descendants for any pecuniary consideration; they could not be conveyed by Thomas Lord Fairfax the younger, by the deed of the 4th of September, 1706, for the payment of his debts, or be devised by his will for the payment of his creditors: the suit in Chancery, which was instituted by his creditors to obtain the sale of his estates for the

* See the judicial argument of Sir *W. Alexander* L. C. B. 1 *Young*. p. 88.

† *Att.-Gen. v. Rigby*, 3 P. W. 145.; *Att.-Gen. v. Leake*, ib. note; *Albemarle v. Rogers*, 2 Ves. J. 477.; *Att.-Gen. v. Brentwood School*, 3 B. & Ad. 59.; and the nomination must be exactly performed; *Att.-Gen. v. Scott*, 1 Ves. Sen. 412.

payment of their debts, could not affect the right of Bilborough and the nomination of a minister, which he was only a trustee: the consideration which was paid by Robert Fairfax for the advowson to him by the deeds of the 13th and 14th of July, 1716, was for the benefit of the creditors and other persons having demands on the estate of Thomas Lord Fairfax: the trustees who were appointed to pay his debts were the persons who conveyed such tithes and right of nomination of a minister to Robert Fairfax and John Hardwicke. It is a rule of courts of equity that a trustee shall not derive any benefit to himself from his trust. If he were permitted to sell the estate in the tithes and the right of nomination for a pecuniary consideration, such sale would be contrary to the trust; and the persons for whose advantage the trust was intended would be sufferers by the sale.*

If the tithes and power of appointing a minister had passed by the conveyance to Robert Fairfax and John Hardwicke, the right would have been vested in the heir of John Hardwicke, in the year 1821, at the time when the Respondent Benjamin Eamonson was nominated to be preaching minister at Bilborough, and some years afterwards. When an advowson is conveyed to a trustee or mortgagee, it is necessary that the nomination and presentation to the benefice be made by the person in whom the legal estate is vested, and not by the person who is entitled to the beneficial interest. The Respondent Benjamin Eamonson was never nominated to be the

* *Case of Magdalen College*, 11 Rep. 77. a.; *Case of the Bishop of Exeter*, 7 Rep. 12. a.

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ing minister at Bilborough by the heir of John Hardwicke. The tithes and the right of nomination of a preaching minister were not conveyed to the Respondent Thomas Lodington Fairfax until the 21st March, 1826; and there did not become due from the Appellants any tithes whatever in Bilborough between that time and the 9th of May, 1826, when the Respondents filed their bill in this cause. The decree has directed the Appellants to account for and pay to the Respondents tithes for a longer period than the time to which the Respondents are entitled to such tithes.

The devise by the codicil is only of a portion of tithes, and not of a rectory, or of a benefice, which entitles the possessor to tithes; it is incumbent upon any person, and more especially a layman, who claims a portion of tithes, to prove clearly to what monastery or other ecclesiastical body such tithes belonged, of what such portion of tithes consisted, and in what manner, and by what conveyances, the person claiming such tithes derives his title thereto*; or that such such person should establish his title to such tithes in a court of law before he is entitled to an account respecting such tithes in a court of equity. It appears from the several ministers' or collectors' accounts, which contain an account of all the tithes and hereditaments to which the priory of the Holy Trinity in York was entitled, that the only tithes to which such priory was entitled in Bilborough were the tithes of corn, which were then of the yearly value of 6*l.* 10*s.*, and were in the tenure of Sir Leonard Beckwith. The bill of particulars by which John Wright and Thomas Holmes required to purchase,

* *Norbury v. Meade*, 3 Bligh, O. S. 211

and did purchase, the tithes of Bilborough from the Crown described the tithes to be the tithes of the manor of Bilborough, and to be of the yearly value of 6*l.* 10*s.*, and demised to Sir Leonard Beckwith at that rate, although King Edward the Sixth, by his letters patent, gives and grants to Wright and Holmes those his tithes of corn, grain, blades, hay, and lambs, and other his tithes whatsoever in Bilborough, then or lately in the tenure of Sir Leonard Beckwith, formerly belonging to the priory of the Holy Trinity, in the city of York, yet where a bill of particulars has been filed, which shows what tithes the parties agreed to be taken from the Crown, courts of equity have construed letters patent granted in pursuance thereof not to extend to more tithes than are mentioned in the bill of particulars. The contents of the letters patent to Wright and Holmes is that of all the tithes in Bilborough, then or lately in the tenure of Sir Leonard Beckwith, to the last of the priory of the Holy Trinity formerly belonging, and all tithes whatever. It appears by the lease made to Sir Leonard Beckwith, which had not expired at the date of the letters patent, that the only tithes demised to him were the tithes of corn and hay, which then and lately belonged to the priory of the Holy Trinity, and all the ministers' or collectors' accounts of the tithes of the priory of the Holy Trinity state, that the priory was entitled only to the tithe of corn in Bilborough; therefore, if the Responder is entitled to any tithes in Bilborough, it would be the tithe of corn only; but the decree has required the Appellants to account to them for a value of tithes whatever, which far exceed all the tithes mentioned in the letters patent.

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Neither the decree nor the evidence in Guy Fairfax's suit are evidence in this suit, because the parishioners were not parties. The defence was a modus. The evidence also of the title in that case was improperly admitted. *Lord Peterborough v. Germain*, 3 B. P. C. 589.; *Byam v. Booth*, 3 Ea & Y. 717. note; *Everard v. Aston*, 3 B. P. C. 561.

For the Respondents *, Mr. *Simpkinson* and Mr. *Duckworth*.

The question as to the right of nomination depends on two circumstances: 1. Whether property of this nature is alienable at law? 2. As to what they call the legal estate, whether it is not in effect a legal right of nomination?

As to the first, what difference is there between this ecclesiastical benefice and an advowson or a vicarage?

In 1716, the Court of Chancery directed this benefice to be sold, and in 1784 decreed the tithes to the alienee. This was not a mere charitable trust: the right of nomination was not given to Henry Fairfax as a charitable trust, but was property in him, just as an advowson would have been. This was not the case of a foundation by Thomas Lord Fairfax: he was rector, or at least seised of all the tithes. 17 C. 2. c. 3. § 7. The will of Lord Fairfax clearly shews that there was an impropriate rectory.

As to the second point, the legal estate in the benefice, or the legal right of nomination, is reserved to Robert Fairfax and his heirs. Robert Fairfax having the right of nomination, has the legal right of nomination. It is different from the

* This argument is very shortly reported. It will be found more at length, in chief and in reply, in 1 Yo. p. 79.

case of a presentation to the living. But supposing it was not a legal right, a court of equity would order the trustee to present the nominee person having the equitable right. *Serjeant's Case*, 1 Strange, 403. The Plaintiffs, even had an equitable title only, might have filed bill for tithes. The main point is, what was passed by Lord Fairfax's will? The tithes of the rectory were vested in the prior of the Holy Trinity at York. Pope Nicholas's Taxation, the Rolls, and the Inquisition, as to the possession of the alien priors, all prove that the *ecclesia* was the priory. That *ecclesia* means rectory from Fitz. Nat. Brev. title *Quare Impedit*.

A similar inference is to be drawn from *Westminster*, 2 St. 1. c. 15. In 48 Edw. 1 the rectory was vested in the prior of the Holy Trinity. Did the priory ever part with it? We find that it did; and at all events the tithes of corn and perhaps of hay, came to the Crown. These tithes, other than corn and grain, could not have been granted to a layman; they must have remained in the priory. There was a salary *per annum* paid by the Crown to the minister; if the Crown had the small tithes, it was bound to provide a minister; but if it had only the great tithes it was not bound.

The authorities for the several points were to pleading and title, *Crayborne v. Taylor*, 3 B. & C. 650.; *Lowther v. Bolton*, 3 Gwill. 1120.; *v. Legh*, 1 Bli. N. S. 306. That the interest was assignable, *Attor. Gen. v. Floyer*, 2 Vern. 441.; *Attor. Gen. v. Brentwood School*, 3 B. & C. 1.; *Mylne & K.* 376. Upon the question as

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legal estate, 17 Vin. Ab. 300. E. 2. pl. 152. and 314. *et seq.* Upon questions between mortgagor and mortgagee, 17 Vin. Ab. 324. As to claim of tithes upon the equitable title, *Glegg v. Legh*, 1 Bli. N. S. 302.; *Cherry v. Legh*, *ib.* 306. That an impropiator of small tithes is bound to maintain a minister, *Bonsey v. Lee*, 1 Vern. 247.; 1 E. & Y. 548. As to curates, *ad mensam monachorum*, 2 Burn. Eccles. Law, 53. As to settling tithes on curate, 17 Cha. 2. c. 3., that *garba* may extend to hay, *Barsdale v. Smith*, Cro. Eliz. 633.; *Oglander v. Lord Pomfret*, 3 E. & Y. 1312.; to hay and flax, Litt. Rep. 263., 1 E. & Y. 369.; to green peas and beans, *Sims v. Bennett*, 3 Gwill. 882.; to wood, *Baskerville v. Clarke*, 4 Gwill. 1567.; to seeds, *Dawes v. Benn*, 1 Barn. & Cres. 751.; to agistment, *Illingworth v. Legh*, 4 Gwill. 1615. As to the king's grant, 1 Edw. 6. c. 8., 7 Edw. 6. c. 3.; *Dickinson v. Reade*, 1 Gwill. 358.; Anon. Dyer, 269. a. *id.* 350. b.; *Barker v. Bacon*, Cro. Jac. 48.; *The Queen v. Lewis*, 1 Leon. 119. As to presumption of farther grant, *Beddle v. Beard*, 12 Co. 4. b.; *Mayor of Hull v. Horner*, Cowp. 102.; *Sawbridge v. Benton*, 2 Anstr. 372.; *Goodtitle v. Baldwin*, 11 East, 488.; *Gibson v. Clarke*, 1 Jac. & W. 159. On the questions of evidence, *Scott v. Allgood*, 4 Gwill. 1369. 1372. Decree for tithes against one occupier good against another, *Travis v. Chaloner*, 3 Gwill. 1237. As to the effect of depositions, 1 Phill. Ev. 364.; *Freeman v. Phillips*, 4 M. & S. 486.

The decree was affirmed.

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ENGLAND.

(COURT OF CHANCERY.)

THOMAS LEWIS, Esq. and ROBERT } *Appellants;*
ANDREW STEVENS - - - }

WILLIAM BRIDGMAN the Younger } *Respondents.*
and JOHN LEWIS MALLET - - }

To a bill in equity by L. and his lessee against an occupier of lands, stating a seizure of the corn, grain, hay, and grass, yearly arising within a certain district or portion of land in the parish of C., and praying an account of clover, vetches, and other grasses cut green, the Defendant pleaded that he was not seised of any tithes within the parish of C., except such as belonged to the parsonage of Cannon (the district, &c.), which was an impropriate rectory, to which the tithes of clover, &c. cut and taken without being made into hay did not belong, &c. Issue being taken upon this plea, the Vicar of C. (not being a party to the suit) was examined as a witness, and deposed that there was no endowment; that he was entitled to the small tithes, and that he had always received a money composition for the small tithes, including the parsonage of Cannon.

The bill was dismissed, and the decretal order affirmed on appeal.

ON the 28th of June, 1824, the Appellants filed their original bill of complaint in the Court of Chancery against Sir Samuel Young, Bart. The bill stated that the Appellant Thomas Lewis was in and prior to the 3d of May, 1815, and had been for several years before that time, and had ever

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since continued to be seised of and well entitled to the tithes of corn, grain, hay, and grass, yearly arising, renewing, and increasing within a certain well known district, or portion of land, within the parish of Cookham, in the county of Berks, which is called by the name of the lower division of the parish of Cookham, and which district was bounded as therein particularly mentioned: that by an indenture, bearing date on or about the said 3d of May, 1815, and made between the Appellant Thomas Lewis of the first part, Thomas Waghorne therein described of the second part, and the Appellant Robert Andrew Stevens of the third part, it was witnessed that the Appellant Thomas Lewis thereby demised unto the Appellant Robert Andrew Stevens all the aforesaid tithes, to which the Appellant Thomas Lewis was so entitled as aforesaid, with others, by the description of all that parcel of tithes of corn, grain, hay, and other tithes whatsoever appertaining or in anywise belonging to the parsonage of Cannon in Cookham, in the county of Berks, coming, increasing, renewing, or growing in and upon all the lands, arable, meadow, and pasture ground whatsoever, lying and being within the parish of Cookham aforesaid, and within the limits, precincts, and boundaries therein before mentioned; to hold the same and certain other hereditaments thereby demised unto the Appellant Robert Andrew Stevens, his executors, administrators, and assigns, from the date thereof, until the 29th of September then next, at the rent therein mentioned; and to hold the same unto the said Appellant Robert Andrew Stevens, from the said 29th of September then next, for the term of

thirteen years, at the rent therein mentioned that under and by virtue of the said indenture the Appellant Robert Andrew Stevens came entitled to the tithes of corn and grass and grass, yearly arising, growing, renewing and increasing on all the land situate within part of the said parish of Cookham, or the places thereof, as was or were comprised within the limits, precincts, and bounds as that the said Sir Samuel Young had, in the years 1820, 1821, 1822, 1823, and 1824, held and enjoyed, and that he then continued to hold and occupy, a certain farm, or portion of arable land, and pasture land, situate, lying, and being within the said parish of Cookham, or the places thereof; great part whereof was comprised within the precincts and bounds in the indenture mentioned and described; the tithes were thereby demised to the Appellant Robert Andrew Stevens as aforesaid, containing in the whole 162 acres of land, statute measure, or thereabouts of which 134 A. OR. 37 P., or thereabouts situate within the precincts of the lands, the tithes whereof were demised to the Appellant Robert Andrew Stevens as aforesaid; and that the said Sir Samuel Young had in each of the said years 1821, 1822, 1823, and 1824, or in some of the said years, cut and taken from his farm and lands situate within the boundaries aforesaid large quantities of clover, tares or vetches, meadow and ryegrass and other grasses, which he had from time to time carried away, without making the same in and out, and that he had carried off part thereof within the swathe, and other part thereof whilst in

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and the Appellants submitted that the tithe of all such clover, tares or vetches, and grasses so cut and taken away by the said Sir Samuel Young, ought to have been set out to the Appellant Robert A. Stevens, as such lessee as aforesaid, or that a full compensation for the same ought to have been paid to the said Appellant ; but the said Sir Samuel Young had taken the tithes of all the said titheable matters and things aforesaid, and converted the same to his own use, without setting out the same to the Appellant Robert Andrew Stevens, as such lessee as aforesaid, and without making to the said Appellant any allowance or satisfaction for the same ; and that the said Appellants had frequently requested the said Sir Samuel Young to account with the Appellant Robert Andrew Stevens for the value of the several titheable matters and things so subtracted by him as aforesaid, or to make to the said Appellant a full recompense or satisfaction for the same ; and the Appellants charged that the said Sir Samuel Young had refused to comply with such requests, alleging that the Appellant Thomas Lewis was at the time of making such indenture of demise only entitled to the tithe of hay within the said district, and that in the said Appellants' title deeds tithe of grass was not conveyed to the said Appellant by name, but tithe of hay only ; and the Appellants further charged, that by law the person who was entitled to the tithe of hay was entitled to the tithe of all clover, tares or vetches, and grasses of every description, severed from the ground by the hand of man, from the moment the same was so severed ; and that if, as the said Sir Samuel Young at times pretended, he had given

part of such clover, tares or vetches, and grasses to husbandry horses, he had at the time upon his said farm and lands sufficient provender or food, or in case he had not sold or disposed thereof, he might have had upon his said farm and lands sufficient provender or food fit for the sustenance of such husbandry horses, without having had recourse to such clover, vetches, tares, and grasses, so carried away by him as aforesaid; and that the said Sir Samuel Young had given considerable quantities of such clover, tares or vetches, and grasses to horses employed by him for hire in towing barges along the river Thames, in which occupation or business he had in each of the said years employed a considerable number of horses; and the Appellants further charged that the tithes of such clover, tares or vetches, and grasses, in fact belonged to and ought to have been set out by the said Sir Samuel Young to the Appellant Robert Andrew Stevens, as such lessee as aforesaid, and were of considerable value, as it would appear if the said Sir Samuel Young would set forth in what state the said clover, tares or vetches, and grasses were when the same were respectively so carried away, and the true accounts thereof, and the value thereof, and how many horses he had kept, and how the same had been used for towing barges, and what provender fit for the sustenance of horses he had sold from his said farm and lands in each of the said years, but which he refused to do; and the bill prayed, that Sir Samuel Young might come to a fair and just account with the Appellant Robert Andrew Stevens, for the single value of the tithes of all the clover, vetches or tares, and grasses, which he in manner aforesaid had taken from off his said

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farm and lands in the several years 1820, 1821, 1822, 1823, and 1824 ; and that the said Sir Samuel Young might be decreed to pay unto the Appellant Robert Andrew Stevens, what should appear to be coming to the said Appellant, on taking of the said account and for general relief.

On the 7th January, 1825, Sir Samuel Young put in a plea to the bill, stating, that the Appellants were not, nor was either of them seised or possessed of, or entitled to any tithes or tithe whatsoever within the parish of Cookham, in the said bill mentioned, or the titheable places thereof, except only such tithes as appertained or belonged to the parsonage of Cannon, in the said bill also mentioned, and that the said parsonage of Cannon was an impropriate rectory, to which the tithes of clover, tares, vetches, meadow and rye grass, and other grasses, cut and taken and carried away without being made into hay, did not, nor did any of such tithes appertain or belong, and therefore that the Appellants were not, nor was either of them entitled to have from the said Sir Samuel Young any such account or payment as in and by the said bill was prayed, or to have as against him any discovery or relief in respect of the tithes of such clover, tares, vetches, and grasses, as in the said bill mentioned, or any of them, and he pleaded the same in bar to the said bill and to the relief and discovery thereby sought.

Issue was taken upon the plea, and witnesses * having been examined on both sides, the cause was

* Mr. Whatley, Vicar of Cookham, deposed that the parish of Cookham is a vicarage, and that no species of small tithes belonged to the parsonage of Cannon, which is a district forming part of the parish; that there is no endowment, and the Vicar is entitled to the small tithes; that no small tithe had

set down for hearing, but before the suit was heard, Sir Samuel Young died, whereby the suit and proceedings became abated.

On the 12th of November, 1828, the Appellants filed their bill of revivor and supplement to the Respondents, the executors of Sir Samuel Young, by which bill it was prayed that the suit might be revived, and that the Respondents admit assets of Sir Samuel Young come to their hands, sufficient to satisfy the amount of the tithe of the Appellant Robert Andrew Stevens, in respect of the single value of the tithes of green clover, vetches, tares, and grasses taken on Sir Samuel Young's farm, in the several years specified in the bill stated, or that an account might be taken of the personal estate and effects of Sir Samuel Young, and that the same might be applied in payment of what was due to the Appellant Robert Andrew Stevens, in a due course of administration; the Respondents being duly served with process of subpoena, appeared and put in answers to the bill of revivor and supplement, whereupon the original suit was revived.

ever been set out in kind, but that he had always received a money composition for the small tithes of the parish, in the parsonage of Cannon. Henry Allnutt made deposition to the same effect. In cross-examination Mr. Whately stated that in answer to a letter from the Plaintiff's solicitor, he stated that he did not claim tithe of green clover and tares, but that he did not thereby mean to compromise the rights of the Respondents. Allnutt, in cross-examination, admitted that upon the issue of legal proceedings, he had set out the tithe of clover, green and tares; but in his examination in chief he stated that he had done so because the matter in dispute was the value, and from fear of the expense of litigation. A document purporting to be a terrier was also produced on the part of the Respondents, as to which, see the argument, post, p. 91.

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On the 25th of January, 1830, the original cause and the revived and supplemental cause came on to be heard, before the Vice-Chancellor, and by decretal order on the 29th of January, 1830, the Plaintiffs' bill was dismissed * with costs. The appeal was from this decretal order.

For the Appellants, Mr. *Knight* and Mr. *Spence*.

By the effect of the plea of Sir Samuel Young, it was admitted, that Thomas Lewis was entitled to the parsonage of Cannon, and that the parsonage of Cannon was an inappropriate rectory: the *prima facie* title of the Appellant Robert Andrew Stevens, the lessee of the Appellant Thomas Lewis, to the tithes demanded by the bill was therefore admitted, and it was incumbent on Sir Samuel Young to have proved by evidence that these tithes did not belong to the impropiator, that being the issue of fact tendered by the plea.

Sir Samuel Young entered into evidence, with a view to prove that the vicar was entitled to the tithes in question, but the evidence failed to establish that fact. The only witnesses examined on the part of Sir Samuel Young to this point were, the Rev. Mr. Whately, the vicar of the parish, who was materially interested in the event of the suit, and Mr. Allnutt, who had for several years occupied a farm within the parsonage of Cannon; Mr. Whately, the vicar, whose evidence on the subject was very indefinite, did not state a single instance of the tithes in question having been set out in kind, or of any payment having been made to him in respect of the tithes in question, but merely stated that he had received a composition for all the small tithes; but from the letter admitted on his cross-examination to have been written by him

* See *Lewis v. Bridgman*, 3 Sim. 316.

in 1822, it is evident that such composition did not include any tithes of the nature demanded by the Appellants, and that Mr. Whately did not at that time consider himself entitled to such tithes. Mr. Allnutt proved that in the only instances in which the tithes in question had been rendered in kind, they had been collected by the Appellant Robert Andrew Stevens, as lessee of the Appellant Thomas Lewis, as impropriator of the parsonage of Cannon, and that he had never set out the tithes in question, or paid any composition in lieu thereof to the vicar; and it appeared on his cross-examination, that in 1822 he had himself voluntarily set out the tithes in question on his own farm in kind, to the Appellant Robert Andrew Stevens, and had admitted the Appellants' right to such tithes in 1824.*

The documentary evidence proved by Sir Samuel Young consisted of a certificated copy of a document from the registry of the Lord Bishop of Salisbury. This document is not signed by any person, and although it was represented at the hearing, and was treated by the learned Judge in giving judgment to be a terrier, dated in 1715, and signed by the then churchwardens, it is not in fact so dated or signed, nor does it in fact bear any date or signature, nor is it in any manner authenticated as a terrier, and ought not to have been received in evidence. Even if the Respondents had made out that the vicar was entitled to all the small tithes, the Appellants would in law have been entitled to a decree for an account of the tithes demanded by their bill, particularly of the tithes of tares or vetches. There was at least suffi-

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* See *Lewis v. Allnutt*, ante, Vol. II. N. S. p. 83.

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cient of doubt upon the evidence to entitle the Appellants to an issue, which was applied for by the Appellants and refused.

For the Respondents, Sir *Edward Sugden* and Mr. *Kindersley*.

The only tithes to which the bill alleges a title, are certain tithes, within a certain district, called, "The Lower Division of the parish of Cookham." The plea denies the title of the Appellants to all tithes within the parish of Cookham, except such tithes as belong to the parsonage of Cannon; thus putting in issue the title alleged by the bill, and no evidence was offered by the Appellants in support of such alleged title. The title as stated in the bill is that of a portioner, and so it is demised. They should, therefore, strictly prove their right, *Meade v. Norbury*, 3 Bli. 211. They should then put that it is a lay fee by the original grant, then the severance of the portion from the principal rectory. It is a negative plea with an affirmative, that the parsonage is an inappropriate rectory to which the tithes do not belong. They take issue on this plea, and ought to prove their title. The Defendant could not give conclusive evidence of the negative. They give general *prima facie* evidence, as in the plea of not heir. They have neither by witnesses nor documents shown that the tithes belong to the parsonage. There is no evidence of perception, nor any evidence but what is extracted from the plea under the admission without noticing the qualification: this is not sufficient.

The authorities cited were, *Hodgson v. Smith*, Bunbury, 279.; *Steers v. Brassier*, 2 E. & Y. 61.;

Sims v. Bennet, 5 B. P. C. 586.; *Pomfret v. Lander*, 1 E. & Y. 527.; *Knight v. Halsey*, 4 Gwill. 1554. *Lagden v. Flack*, 2 Hagg. 363.; *Lewis v. Alkutt*, 2 Bli. N. S. 83.; *Stevens v. Aldridge*, 3 E. & Y. 879.; *Newman v. Morgan*, 2 E. & Y. 565.; *Wallis v. Pain*, 2 E. & Y. 67.; *Smith v. Huggins*, 2 E. & Y. 127.; *Corman v. Sears*, 6 Pri. 338.; *Lewis v. Young*, 3 E. & Y. 1135. 13 Price, 394. 1 M. & L. 113. *Norbury v. Meade*, 3 Bligh, O. S. 211.

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At the conclusion of the argument, the Lord Chancellor observed that the appeal in *Lewis v. Young*, which had abated, might be revived, and that this was in effect an appeal from the principle of the decision in that case. As to the authority of *Lagden v. Flack*, he said that the judge who decided that case had little experience in the subject matter of the decision, as tithe cases were of rare occurrence in the Ecclesiastical Courts, and the judge himself did not seem to have great confidence in his own knowledge of the subject, since it appeared that he had applied to the Lord Chief Baron of that day for information, and from him gathered the information that grass severed by a scythe is one sort of tithe, but if taken by the mouth of an animal is of another description: that the authority of a decision under these circumstances ought not to have great influence on the judgment of the house. He said that he did not entertain much doubt upon the question, but desired a short time to look into the authorities.

On the 9th of July, judgment was affirmed without further observation.

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(COURT OF EXCHEQUER.)

MARGARET TOULMIN, THOMAS B. } *Appellants;*
SIMPSON, and BRYAN HOLME - }

JOHN COPLAND - - - - *Respondent.*

Upon a partnership between T. and C. it was agreed that T. should bring into the new partnership 40,000*l.* of good debts owing to a former partnership, in which he had become the surviving partner, for the purpose of meeting the claims by debts transferred from the old firm to the new, upon which condition T. was to have two thirds of the profits of the new partnership, and C. one third; but if 40,000*l.* of such debts should not be brought in, then the division of the profits should be in moieties. Debts to an amount exceeding 40,000*l.* were accordingly transferred, and became part of the partnership funds of T. and C., out of which the partners drew monies respectively for their own use, and out of which also advances were made to the customers of the old firm, in which T. was the surviving partner.

Upon a bill in equity by the executors of T. against C., praying accounts, &c.; and upon a reference to inquire whether 40,000*l.* of good debts had been brought in according to the agreement, and if so, to take the account accordingly; and if not, to inquire whether any new agreement had been entered into to share the profits in moieties, the Master found that 40,000*l.*, &c. had not been brought in; but he did not proceed to take the account nor to inquire as to the existence of any new agreement.

This report was confirmed, and the account directed to be taken in moieties, chiefly upon the assumption of the existence of a new agreement.

Held, on appeal, that the 40,000*l.*, &c. had been brought in according to the original agreement; that exceptions to the report ought to have been allowed on this ground, and that the matter ought to go back to the Master to perfect the inquiry directed by the original decree.

THIS appeal arose upon a bill filed by appellants in the Court of Exchequer, in 1811, bringing a case to the following effect.

In the year 1806, Richard Toulmin, and Abraham Toulmin, the husband of the said Margaret Toulmin, carried on the business of agents, in partnership together, in equal shares; the profits of the business were considerable, amounting, on an average, to 2650*l.* per annum. On the 31st August, 1806, the partnership was dissolved in consequence of the derangement of Richard Toulmin, and Abraham Toulmin became bound to carry on the business on his own account for his own benefit. At the time of the dissolution of the partnership of Richard and Abraham Toulmin, there were debts owing to the partnership to the amount of 66,000*l.*, and there were debts by the partnership to the amount of 41,000*l.*

On the 1st of September, 1806, Abraham Toulmin took the Respondent John Copland as a partner with him in the business, and they, from that time to the time of the death of Abraham Toulmin, which happened on the 4th of January, 1819, carried on the business in partnership together, under the name of Toulmin and Copland, upon the terms that Abraham Toulmin should bring into the partnership firm of Toulmin and Copland, 40,000*l.* of good debts owing to the late concern of Richard and Abraham Toulmin, for the purpose of satisfying the claims by debts transferred from such dissolved firm, and that John Copland should contribute 4000*l.* into the concern of Toulmin and Copland, and that Abraham Toulmin should have two-thirds parts of the profits of such concern, and Jo

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land the remaining one third part thereof. The capital brought into the partnership business of Toulmin and Copland, by Abraham Toulmin, consisted of a moiety of the monies received by the firm of Toulmin and Copland, on account of the debts due to the firm of Richard and Abraham Toulmin, after deducting the monies paid by the firm of Toulmin and Copland on account of the debts due from the firm of Richard and Abraham Toulmin, and such moiety amounted to the sum of 8700*l.* and upwards. The average profits of the partnership business of Toulmin and Copland, during its whole continuance, were upwards of 8000*l.* per annum.

On the 1st of September, 1806, the partnership of Toulmin and Copland opened for themselves a new set of books, into which they, under that date transferred debts due to the partnership of Richard and Abraham Toulmin to the amount of 60,000*l.*, carrying interest, according to the custom of the business of navy agents, at the rate of 5*l.* per cent., and which debts when transferred were therein stated to be due to the firm of Richard and Abraham Toulmin, or to be brought from certain books which belonged to them, and the accounts so transferred were always afterwards carried on in the books of Toulmin and Copland, as the accounts of Toulmin and Copland alone, though they included the balances belonging to the firm of Richard and Abraham Toulmin; and the firm of Toulmin and Copland from time to time received and paid monies on such different accounts, and from time to time struck balances thereon, and the sums remaining due, if any, at the time of such balances being struck, were carried

on as debts due to the firm of Toulmin and Copland, and afterwards the accounts were cleared by receipts and payments, in the usual way between the debtors and the firm of Toulmin and Copland.

The firm of Toulmin and Copland treated such accounts as their own, in the manner above-mentioned, but they also brought actions at law, in their own names, against several debtors, for the whole of the balances which were due from such debtors, at the respective times when such actions were brought. The firm of Toulmin and Copland also transferred into their own books, the whole or the greater part of the debts owing by the firm of Richard and Richard Toulmin, and treated them as their own.

Abraham Toulmin died on the 4th of October, 1819, having made and published his last will and testament in writing, bearing date the 28th of November, 1818, whereby he gave and bequeathed his estate and effects, whatsoever and wheresoever, to the Appellant Margaret Toulmin his wife, and appointed all the Appellants executors, who accordingly proved the will in the proper Ecclesiastical Court, and thereby became the legal personal representatives of Abraham Toulmin.

The bill claimed two thirds of the profits of the partnership, and prayed the usual partnership accounts of the firm of Toulmin and Copland to be made, and an injunction and receiver.

Before John Copland put in his answer to the bill, on the 29th of January, 1819, in support of the motion made by him in the cause, he filed an affidavit, which, so far as it is material

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stated, was in the words following: " John Copland
" maketh oath and saith, that he the said deponent
" and Abraham Toulmin deceased, the testator
" in the pleadings in the said cause named, in
" the year 1806, became concerned together as
" co-partners in the trade or business of navy
" agents, and they continued to be concerned
" together, or to be such co-partners, until the
" time of the death of the said Abraham Toulmin,
" which happened on the 4th of January, 1819,
" and that it was on the formation of such co-part-
" nership, in the first instance, agreed between the
" said deponent and the said Abraham Toulmin,
" that upon the said Abraham Toulmin's bringing
" into the said partnership between him and the
" said deponent 40,000*l.* of good debts, which
" were owing to the late concern which was car-
" ried on in partnership with the said Abraham
" Toulmin and Richard Toulmin, then a lunatic,
" and which was for the purpose of meeting the
" claims by debts transferred from the said firm,
" and upon the said deponent's bringing 4000*l.* into
" the said partnership concern between him and
" the said Abraham Toulmin, the said Abraham
" Toulmin should be entitled to two thirds of that
" concern, and the said deponent to the other
" third of such concern; but the said Abraham
" Toulmin not being able to bring 40,000*l.* of good
" debts into the said partnership concern between
" the said deponent and the said Abraham Toulmin,
" it was afterwards agreed between them, the said
" deponent and the said Abraham Toulmin, that
" they should carry on their said co-partnership
" trade or business of navy agents, upon equal
" terms as to profit and loss; and they did accord-

“ ingly so carry on such trade or business
“ the said deponent further said, that
“ Abraham Toulmin and the said deponent
“ came to any settlement of accounts
“ touching the said partnership concern
“ all accounts from the commencement of the
“ partnership concern were, at the time of the
“ death of the said Abraham Toulmin, unsettled
“ were, open and unsettled. And the said deponent
“ further said, he verily believed it would take
“ three or four months at least to make out the
“ said partnership accounts, every proper
“ diligence being used for that purpose,
“ would take several weeks after the books were
“ balanced, to make out an account and list
“ of all the debts which were due and owing to
“ the said partnership, or which the said partnership
“ was liable to pay at the time of the death of
“ the said Abraham Toulmin, and of the debts
“ which were due and owing to the said partnership
“ ship, every proper and due diligence being used
“ for that purpose. And the said deponent further
“ said, that the debts owing from the said partnership
“ ship, or which the said partnership was liable to
“ pay, at the time of the death of the said
“ Toulmin, as far as the deponent could ascertain
“ an estimation or belief, exceeded the sum of
“ £22,000L. ; and that the debts owing from the
“ partnership at the time of the death of the said
“ Abraham Toulmin, as far as the deponent could
“ form a belief, exceeded the sum of £22,000L.
“ the least ; but the said deponent said he
“ believed that several of the debts so ascertained
“ said partnership, and to the amount of £22,000L.
“ at the least, were bad or doubtful debts.

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" the said deponent further said, that from the
" nature of the business of a navy agent, it would
" and must be some time before such of the debts
" due to the said partnership, as were good and
" recoverable debts, could be recovered or re-
" ceived."

The Respondent by his answer, after stating the terms of the co-partnership to the same effect as in the bill, proceeded to aver, that it was distinctly and positively agreed that in case the said Abraham Toulmin should fail of bringing into the said co-partnership with the Respondent from the said old co-partnership of Richard and Abraham Toulmin, good and available debts to the amount of 40,000*l.*, to answer the purposes aforesaid, the said partnership between the said Abraham Toulmin and the Respondent should be carried on on equal terms, they being entitled in equal moieties to the profits and losses thereof. And the Respondent thereby insisted that the said Abraham Toulmin, failing to bring from the old co-partnership of Richard and Abraham Toulmin good and available debts to the amount of 40,000*l.*, the alternative of the said agreement was adopted, and the said Abraham Toulmin and the Respondent became interested in the said co-partnership in equal moieties from the 1st of September, 1806; and that it was then decidedly agreed between them that the said co-partnership business should thenceforth be, and the same was carried on by them down to the time of the death of the said Abraham Toulmin in equal shares and proportions. And the Respondent by his answer, insisted that he was entitled to one moiety or half-part of the profits of the partnership concern.

The bill was dismissed against the Governor of the Bank of England, by order dated the 26th of February, 1827.

Witnesses were examined, and documentary evidence was given in the cause. The material evidence on the part of the Plaintiffs, before mentioned affidavit of John Copland, the depositions of Samuel Simpson Toulmin and Robert Reynolds.

The cause was heard before the Lord Baron, on the 12th of June, 1828, when the Lordship, after directing the partnership account to be taken, ordered that it should be referred to the Master to inquire and state to the Court whether Abraham Toulmin the testator brought into the partnership of Toulmin and Copland 40,000*l.* of good debts which were owing to the late concern which was carried on in partnership with Abraham Toulmin and Richard Toulmin according to the true intent and meaning of the agreement stated in the affidavit of the defendant John Copland, sworn in this cause the 29th of January, 1819; and also to inquire whether the said agreement was at any time after the commencement of such partnership, varied and under what circumstances, and in respect. And it was further ordered, that making the inquiries thereinbefore directed the said Master should find that the said Toulmin brought into the partnership of Toulmin and Copland 40,000*l.* of good debts which were owing to the late concern which was carried on in partnership with the said Abraham Toulmin and Richard Toulmin according to the true intent and meaning of the aforesaid agreement.

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the said agreement was not afterwards varied, then that the said partnership between the said Abraham Toulmin and the said Defendant was to be considered as in thirds, and that the accounts should be in such case taken on that footing; and it was referred to the Master to take an account of what, if any thing, was due to the said Plaintiffs, Margaret Toulmin, Thomas Butterfield Simpson, and Bryan Holme, as the legal personal representatives of the said testator Abraham Toulmin, for two third parts or shares of the profits of the said partnership business of Toulmin and Copland; and also to take an account of what, if any thing, was due to the said Defendant John Copland, for the other one third part or share of such profits. And it was further ordered, that if on making the inquiries before directed, the said Master should find that the said Abraham Toulmin did bring into the said partnership of Toulmin and Copland 40,000*l.* of good debts which were owing to the late concern which was carried on in partnership with the said Abraham Toulmin and Richard Toulmin according to the true intent and meaning of the said agreement, and that the said agreement was varied or altered, then that the said Master should take the accounts of the said partnership of the said Abraham Toulmin and the said Defendant, including an account of what, if any thing, was due to the said Plaintiffs Margaret Toulmin, Thomas Butterfield Simpson, and Bryan Holme, as such legal personal representatives as aforesaid, for the profits thereof; and also an account of what, if any thing, was due to the said Defendant John Copland, for the profits thereof, upon the footing and by virtue of such subsequent or altered agree-

ment. And it was further ordered, that if making the inquiries before directed, the said Master should find that the said Abraham Toulmin did not bring into the said partnership of Toulmin and Copland 40,000*l.* of good debts which owing to the said late concern which was carried in partnership with the said Abraham Toulmin and Richard Toulmin, according to the true intent and meaning aforesaid, then that the said Master should take the accounts of the partnership between the said Abraham Toulmin and the said Defendant John Copland, on the footing of their having been partners in equal shares. And it was referred to the said Master, in such case, to take an account what, if any thing, was due to the said Plaintiff Margaret Toulmin, Thomas Butterfield Simpson and Bryan Holme, as such legal personal representatives as aforesaid, for one equal moiety or part of the profits of the said partnership business of Toulmin and Copland; and also an account what, if any thing, was due to the said Defendant John Copland, for the other equal moiety or part thereof.

In proceeding before the Master, under the decree, and upon the inquiry whether Abraham Toulmin did not bring into the partnership of Toulmin and Copland 40,000*l.* of good debts, the Applicants, in addition to the evidence read to the Court by them on the hearing of the cause, produced to the Master, on their behalf, the following evidence: viz. : — The books of account of the partnership of Toulmin and Copland, by which, amongst other things, it appeared that Abraham Toulmin and John Copland were in the habit, from time to time of drawing, from the funds of the partnership

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Toulmin and Copland, various sums of money for their own private purposes, and that in cases where the firm were separately indebted to the same individual, on their own private accounts, such several debts were paid, either by a partnership check on the partnership bankers, or in some other manner, out of the partnership funds, and the amount due from each partner respectively was debited to their respective private accounts.

The evidence shewed, that if the advances made by the firm of Toulmin and Copland to the debtors of the firm of Richard and Abraham Toulmin, were not to be paid out of the monies received from such debtors till the debts due to Richard and Abraham Toulmin, from such debtors, had been discharged, then good debts to the amount of 56,037*l.* 15*s.* 7*d.*, owing to the firm of Richard and Abraham Toulmin had been brought into the firm of Toulmin and Copland, and received by the last-mentioned firm; and 40,000*l.* and upwards of such good debts were brought by Abraham Toulmin into, and actually received by, the firm of Toulmin and Copland before the 1st of September, 1808; and that if the advances made by the firm of Toulmin and Copland, to the debtors of the firm of Richard and Abraham Toulmin, were to be paid out of the monies received from such debtors in the first place and before the debts due to Richard and Abraham Toulmin were discharged, then good debts to the amount of 53,653*l.* 18*s.* 7*d.*, or thereabouts, owing to the firm of Richard and Abraham Toulmin, had been brought into the firm of Toulmin and Copland, and received by the last-mentioned firm, and 40,000*l.* and upwards of such good debts were, on the last-mentioned supposition, brought by Abra-

ham Toulmin into and received by the Toulmin and Copland, before the 1st of September 1811. The evidence also shewed, that the Toulmin and Copland had paid debt from the concern of Richard and Abraham, to the amount of 38,624*l.* 3*s.* 3*d.* thereabouts.

The Respondent produced evidence that an equal division had been made of the stock transactions, and of certain wines] out of the partnership stock, and also that the advances made to the customer of the former partnership, 40,000*l.* of good debt had been brought in upon the formation of the partnership. The Master to whom the cause was referred, by his separate report, bearing date the 26th of May, 1830, after stating the evidence produced before him, found, that the Defendant Copland and Abraham Toulmin the testator, in the year 1806, became concerned together as partners in the trade or business of navy agents, and that they continued to be concerned together to be such copartners, until the time of the death of the said Abraham Toulmin, which happened on the 4th of January, 1819; and he found that, on the formation of such copartnership, the first instance, agreed between the said Defendant John Copland and the said testator, was the said testator's bringing into the said copartnership between him and the said Defendant Copland 40,000*l.* of good debts which were due to the late concern which was carried on in partnership with the said testator and Richard Toulmin, then a lunatic, and which was for the purpose of meeting the claims by debts transferred

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the said firm, and upon the said Defendant John Copland bringing 4000*l.* into the said copartnership concern between him and the said Abraham Toulmin, the said testator should be entitled to two thirds of that concern, and the said Defendant John Copland to the other one third of such concern. And the said Master further certified, that he found that the said testator did not bring into the said partnership of Toulmin and Copland the said 40,000*l.* of good debts, according to the true intent and meaning of the said agreement, as stated in the said affidavit of the said Defendant John Copland, sworn in the said cause on the 29th of January, 1819. And the said Master further certified, that he had directed the accounts to be taken, on the principle contended for on the part of the Defendant, viz., in equal moieties. And he further certified, that his finding that the said 40,000*l.* of such good debts as aforesaid was not brought into the said partnership of Toulmin and Copland, according to the true intent and meaning of the said agreement, having been the subject of objection by the Plaintiffs, and having been requested by them to make a separate report of such finding, in order that the opinion of the Court might be taken touching the same, he had thought fit to make that his separate report accordingly. And he further certified, that he had forborne to take the account directed by the said decree on the footing of the said Abraham Toulmin and the said Defendant John Copland having been partners in equal shares, until the Court should have decided upon the said objections to his said finding, inasmuch as, in the event of such finding being overruled by the Court, the so taking such account

would have occasioned a very heavy and unnecessary expense to all parties.

The Appellants took two exceptions to the report: First, for that the Master has, in and by his said report, found that Abraham Toulmin, deceased, the testator therein named, did not bring into the partnership of Toulmin and Copland, therein mentioned, the 40,000*l.* of good debts therein mentioned, according to the true intent and meaning of the agreement, as stated in the affidavit of the said Defendant John Copland, sworn in this cause on the 29th of January, 1819: whereas the said Master ought to have found in and by his said report, instead of his above finding, that the said testator Abraham Toulmin did bring into the said partnership of Toulmin and Copland the said 40,000*l.* of good debts, according to the true intent and meaning of the said agreement, as stated in the affidavit of the said Defendant John Copland, sworn in this cause on the 29th of January, 1819. Second exception, For that the said Master has, in and by his said report, certified, that he had directed the accounts to be taken, on the principle contended for on the part of the Defendant, viz. in equal moieties: whereas the said Master ought not to have directed the said accounts to be taken on such principle, but on the footing that the said Abraham Toulmin was entitled to two third parts or shares thereof, the whole into three equal parts being divided, and the said Defendant to the remaining one third part or share thereof.

The exceptions were heard before the Lord Chief Baron, who, by an order bearing date the 21st of December, 1830, ordered that the exceptions taken by the Plaintiffs to the Master's report,

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dated the 26th of May, 1830, should be, and the same was thereby, overruled. And it was further ordered, that the said Master's report should be, and the same was thereby, absolutely confirmed.

The appeal was against this order.

For the Appellants, the *Solicitor General*, Mr. *Simpkinson*, (and Mr. *Duckworth*.)

For the Respondents, Mr. *Knight* and Mr. *G. Richards*.

For the Appellants it was, among other things, contended, that the 40,000*l.* was brought; that the Master had not made the inquiry as to any new agreement directed by the decree, without which inquiry he could not properly determine whether the account ought to be taken on the principle that the partners were entitled in moieties; that the judge below had held that the 40,000*l.* had been brought in, and then decided upon the ground of a subsequent agreement.

For the Respondents it was, among other things, contended, that the 40,000*l.* had not been brought in, or, if so, that it was a merely nominal, and not substantial, addition to the capital, since it was in great part applied to making advances to the customers of the old partnership, which was not consistent with the agreement.

30th May,

Lord Wynford.—In this case it appears to me that the material question is, whether the 40,000*l.* of which we have heard so much, has been brought in. The Master has reported, and the late Lord Chief Baron has confirmed the report, that the 40,000*l.* has not been brought in.

I cannot help thinking upon the evidence as it stands, that the 40,000*l.* has been brought in. There is no period stipulated within which the 40,000*l.* was to be brought in; and the meaning of bringing in the 40,000*l.*, which I take from the learned counsel who have argued this case on the part of the Respondents, is the assigning of 40,000*l.* the amount of debts which at the time of the assigning were good: an assignment of debts is not an assignment of the money, but an assignment of that which is a good claim to money to come in at some time or other. As I understand the case, within five years the whole of the 40,000*l.* was paid in: the debts were good or they would never have been paid in; they existed at the time of the original transaction. But I cannot help thinking also, that the 40,000*l.* may be considered to have been otherwise realised; for there were advances of money to the customers of the old firm, and it is not clear that the 40,000*l.* had not been realised at a very early period. It is certainly equally to the advantage of Mr. Copland that this money should be applied to the demands of the new customers, as that it should have been applied for the purpose of paying off the old debts, or perhaps more so; for the house could not have gone on unless the customers had been accommodated in some manner; they could not have gone on but for the realisation of this fund.

I was for some time puzzled by a very ingenious argument addressed to your lordships, that the money was paid in not on account of the old debts, but the pay of officers and other monies due to the house of Toulmin and Copland; but that is not so, because looking at the evidence in both the

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affidavit and the schedule which is annexed to the affidavit, it appears that these were not payments made on account of the customers from time to time, but payments made to satisfy debts existing due from the customers to the house at the time of the dissolution of the partnership of Toulmin and his brother. Now it appears by that schedule, that certainly in five years at all events the whole 40,000*l.* was realised; if the other mode of considering the case was a true one, the whole sum was realised at a much earlier period; but it appears to me that the period of realisation is not the question, but whether there were 40,000*l.* of good debts assignable at the time when that account took place. That there were is perfectly clear, or the money would never have been raised that was realised afterwards. With the greatest respect, therefore, for the judgment of the late Lord Chief Baron, I think that an erroneous view was taken of this case, and therefore I shall move your lordships that this judgment be reversed, or rather the appeal allowed.

The *Lord Chancellor*. — I take the same view of the case before the House with my noble and learned friend. I have taken the opportunity of going through the whole of the papers, and the result, considering the arguments and reading the evidence upon the subject, is, that I have no doubt whatever that the Master has come to an unsound conclusion, when he has found that the 40,000*l.* was not brought in as by the agreement it was required to be.

I could have wished that the parties had agreed to the proposal which was at least perfectly fair to both parties, and I think very much for the inte-

rest of both of them; and which also might have relieved your lordships as well as the Court below from much very useless, very tedious, unprofitable, and in all probability expensive litigation; the proposal went not merely to have referred that which has been already I think adjudicated upon by the Master erroneously, I mean touching the answer to the question put to him in the first inquiry whether the 40,000*l.* was brought in or not? The whole question might have been left most safely by the Appellants to another mode of adjudication, enlightened as it probably would be by the intimation of opinion which those of your lordships who attended this case may be said to have given. My noble and learned friend having stated that he considered the opinion of the Master to be incorrect, I think it would have been expedient that the whole should have gone together, and not merely this part in which I think there has been a miscarriage in the Court below. The consequence of that proposition not being accepted by the parties, is, that it must go back with a direction that the Court shall in the first place allow the exception to that report—that will adjudicate upon the matter of the 40,000*l.* having been brought in. But there was another miscarriage in the Court of Exchequer having adjudicated upon that which was never before the Master, that event never having happened in consequence of which alone the Master was to go into the inquiry. In putting the question, therefore, to your lordships, on my noble and learned friend's motion, in which I entirely concur, I shall propose that your lordships shall adjudge that the decree should be reversed, and that it should be remitted with a direction to allow the exception to

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the Master's report, and then that it should be referred back to the Master to proceed upon the footing of the former decree. It is a very painful thing to be obliged to do this which must lead to further expense. This House has given greater facilities for the expeditious, economical, and easy disposing of the case, in a manner peculiarly adapted to such a case than I ever saw before. I regret for the sake of the parties, the failure of the attempt in this case : I think it would have been wise if they had listened to it ; and I trust the failure will not prevent your lordships repeating the same attempt to other parties should a case of a similar description arise.

Judgment reversed, and the cause remitted with directions.

ENGLAND.

(COURT OF EXCHEQUER.)

The Right Honourable THOMAS }
NORTH Lord GRAVES, Defendant } A
in the Court of Exchequer . . }

The Reverend JONATHAN PARKER }
FISHER, D.D., Plaintiff in the } R
Court of Exchequer . . . }

Held, under the circumstances, and upon the evidence in the following report, that lands within a parish exempted from tithe by a money payment of tithes, and proof that no tithes had ever been rendered.

IN Easter Term, 54 Geo. III. the Respondent filed his bill in the Court of Exchequer, of the rectory and parish church of Farrington, county of Devon, setting forth, that in the month of September, 1805, he was instituted and inducted into the same; that the Appellant at the time of the Respondent's induction, occupied and since occupied farms and lands within the rectory and parish of Farrington, and the places thereof; and had subtracted and appropriated to his own use the tithes arising from such farms and lands, without making any satisfaction to the Respondent for the same; and praying a decree for the single value of such tithes from the Respondent's induction, and that Appellant

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pay to Respondent what should be found due to him on such account.

The Appellant by his answer, stated that he was seized in fee of the manor of Clist, otherwise Clist Satchfield or Bishop's Clist, in the county of Devon, with the demesne lands thereto belonging, part of which demesne lands he believed to be situated within the said rectory or parish of Farringdon; and he contended, that there had been from time whereof the memory of man was not to the contrary, and still was an ancient customary payment of 2*l.* 6*s.* 8*d.* paid and payable by the owners and occupiers of the said manor of Clist, otherwise Clist Satchfield or Bishop's Clist, and the demesne lands thereof, to the rector for the time being of the said rectory and parish church of Farringdon, at Midsummer yearly, and accepted by them for and in lieu of all tithes, both great and small, arising, growing, or increasing, upon or from the demesne lands of the said manor, situate within the said rectory or parish of Farringdon; the Appellant then admitted his occupation of the mansion-house, formerly called Clist Satchfield or Bishop's Clist House, and then called Bishop's Court House, with the barton or farm thereto belonging, situate within the said parish of Farringdon, being as he believed part of the demesne lands of the said manor, and his having had and taken the tithes mentioned in the Respondent's bill; and he submitted that the Respondent was not, for the reasons aforesaid, entitled to any tithes from such farm and lands.

The Respondent replied to the Appellant's answer, and the Appellant having rejoined, the cause was at issue, and evidence produced on both sides.

The cause was heard before the Right Honourable the Lord Chief Baron of the said Court of

Exchequer, on the 27th of January, 1825, and 27th of April, 1825.

The evidence produced by the Appellant relied on at the hearing of the cause in relation to the customary payment or modus, was as follows:

Extract from Pope Nicholas' taxatio
extracts from Domesday.

Depositions of witnesses in proof of the value of the lands of the manor, by metes and bounds, that no tithe in kind has ever been rendered in the memory of man, in respect of such demesne lands, and that the same have been covered by the customary payment.

An indenture of lease, dated 16th of October, 1688, Charles I., from Francis Earl of Bedford to Peter Beavis, Esq., in which the money rent or pension is referred to.

A lease dated 6th of November, 9th of December, 1692, of part of the manor from the Earl of Bedford to John Smith.

Counterpart of a lease, dated 6th of November, 1692, from the Earl of Bedford to Roger Beavis, Esq., of a parcel of the demesne lands of Bishop's Cleeve, containing a covenant by the Earl to indemnify the lessee from tithes.

Indentures of lease and release of the manor, dated 27th of April, 1801; being a conveyance of the said manor, mansion-house, and other premises to the father of Appellant.

Articles of agreement, dated the 19th of December, 1802, for the purchase by the Appellant of the manor.

Parochial books of the parish of Farrington.

A book of account of a receiver of the tithes of the parish of Farrington.

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Nine several receipts for the money payment in lieu of tithes, commencing in the year 1716 and ending 1800.

Extracts from the institution books of the Bishop of Exeter.

Extracts of registers of the burials of various rectors of Farringdon.

The evidence of the Respondent was as follows :

* An extract from, or entry in folio 10 of a book produced from the principal registry of the Bishop of Exeter, purporting to be Bronescombe's register, touching the grant of the church of Ferndon to Walter, Bishop of Exeter.

Another extract from, or entry in folio 74 of the same register, purporting to be an instrument of appropriation, dated A. D. 1276, and intituled Carta de Capella Sancti Gabriel.

An extract from an entry in folio 164 of another book, from the same registry, purporting to be Stapledon's register, intituled Annexio Ecclesiarum de Clist Fomizon et de Farndon, dated Sept. A. 1321.

An extract from, or entry in folio 210 of another book from the same registry, purporting to be Grandisson's registry, vol. 1., being an instrument intituled De Cantaria de Clist, and dated Sept. 1360.

Another extract from, or entry in folio 20 of another book, from the same registry, purporting to be Brantingham's register, and intituled Collatio Ecclesie de Farndon ex causa permutacionis, and dated 22d of October, 1372.

* The substance of these documents appears in the Appellant's argument.

A statement made by the Respondent's counsel, and admitted by the Appellant's counsel, that an annual payment of 40s. had been and was still made out of the rectory or church of Farringdon, to the vicars choral of the cathedral church of Exeter.

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An extract from the Valor Ecclesiasticus of Henry VIII., relating to the possessions of the vicars choral of the cathedral church of Exeter. No. 1.

Another extract from the same Valor, relating to the possessions of the bishoprick of Exeter. No. 2.

Another extract from the same Valor, relating to the church of Clyst St. Michael, otherwise Sowton, in the county of Devon. No. 3.

Another extract from the same Valor, relating to the church of Faryngdon. No. 4.

By the decree it was ordered, that it should be referred to one of the Masters of the Court, to take an account of the single value of the tithes claimed by the Respondent's bill upon the several farms occupied by the Appellant within the rectory and parish of Farringdon aforesaid, within six years next preceding the filing the bill, and that Appellant should pay the amount which might be reported due from him in respect of such tithes, but without costs.

The appeal was against this decree.

For the Appellants, Mr. *Bickersteth* and Mr. *Jacob*.

For the Respondents, Mr. *Boteler* and Mr. *Beames*.

For the Appellant.* The most convenient and

* The argument here given consists of the reasons annexed to the printed case, and signed by Mr. (now Judge) Coleridge.

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the fairest way of considering this case, upon the pleadings and the evidence, will be to see, first, what were the propositions which the Appellant undertook to establish in the Court below, in answer to the common law right of the Respondent, to the payment of tithes in kind ; secondly, what was the evidence, and the effect of it, by which he sought to establish those propositions ; and, lastly, what was the answer, and how supported, by which the Respondent sought to overturn them.

The propositions of the Appellant were twofold : the first, that there is a customary payment of 2*l.* 6*s.* 8*d.* paid and payable by the owners and occupiers of the manor of Clyst and the demesne lands thereof, to the rector of the parish church of Farrington, at Midsummer, annually, in lieu of all tithes, both great and small, arising upon or from the demesne lands of the manor, situate within the parish ; the second, that the lands in respect of the tithes of which the account was claimed, were parcel of the demesne lands.

The effect of the Appellant's evidence, to establish the last of these propositions, was not seriously contested in the Court below. As the closes were many in number, and as several of them had undergone, within time of memory, changes of their respective boundaries, the depositions to establish their identity were necessarily long, and, in parts, difficult to follow ; of course, therefore, there were some remarks made upon them ; but they were, considering the nature of the case, few and unimportant ; and the Court below declared itself satisfied with this portion of the Appellant's proof. It will be unnecessary, therefore, to say more on this part of the case, than to submit, that if any serious

difficulties could have been shewn to the satisfactory nature of this proof, they have been raised in the Court below, among many other reasons, that that Court have had an opportunity of exercising its discretion as to the sending the question to a tribunal most peculiarly proper to afford assistance to the conscience of a court of equity, in deciding such questions as those of identity of a parcel or no parcel of a manor.

The evidence by which the Appellant established the first proposition, was not of the proof most distinct and uniform, that tithes in kind, or composition in lieu thereof according to value, had ever been paid out of the lands in question ; but extended to a general reputation, that a money payment memorially paid and payable ; and to evidence of the most satisfactory nature, that a money payment had, in fact, been made, for a very long time ; indeed, it was admitted by the Appellant and the Respondent, that a money payment had been made for more than a century. The Appellant further proved that, at still earlier periods, the owners of the lands in question had, in the lease, guaranteed the takers against the money payment to the rectors for the time being, taking upon themselves ; and, although the amount of this money payment did not appear upon the leases, yet there could be no reasonable doubt, that the guarantee was relative to the money payment in question.

It is clear that the evidence for the Appellant made out the proposition for which it was made most satisfactorily, subject to two observations.

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The first of these was, that the reputation, as spoken of by some witnesses, tended to shew the demesne lands of the manor to be wholly exempt from the payment of tithe, which is said to be inconsistent with the case of the Appellant. But this objection is entitled to little or no weight, when this fact, which appeared in proof, is adverted to, that all the original demesnes of the manor, in respect of which the money payment was made, have not for several years, been in the ownership of the lord of the manor; and that, as the payment has continued to be made by him in one entire sum, both in respect of the lands remaining in demesne, as well as of those which have been from time to time parcelled off, a reputation may well have arisen as to these latter, that they were entirely tithe free; neither the actual owners or occupiers thereof rendering any thing directly to the rector, and the lord probably thinking it not worth while to make them contribute their minute shares of a sum, so inconsiderable in the whole. The second and more serious objection was, that, upon the evidence, the money payment made appeared to be not that which was alleged in the pleadings, 2*l.* 6*s.* 8*d.*, but 2*l.* 9*s.* 8*d.*: the answer to this is, that upon the evidence it also appeared, that although the rectors had always received one entire sum of 2*l.* 9*s.* 8*d.*, and given receipts for it under one name, as such, yet that, in fact, the three additional shillings were paid in lieu of certain repairs to the body of the church or chancel. Whether the evidence upon which this explanation rested was conclusive, or even satisfactory, is hardly a question in this stage of the proceedings; because the same remark applies to this, which was submitted

with respect to the proof of the identity closes, that it was not made the principle of contest in the Court below; that it distinctly stated, that the judgment proceeded on other grounds; and that, if it had been to decide this point, the Court would not doubt raised as to the amount of the payment, have overturned a payment of substantial antiquity, without sending it to inquiry elsewhere. The evidence, explaining the difference in amount between the sum and the sum proved to have been paid, is not, upon further examination, appears to be satisfactory, that ground, taken alone, not so much a reason for affirming a decree upon a totally different assumption, as for the cause to the Court below, that it is that course for satisfying its conscience, has declared itself ready to pursue.

Assuming, then, that the Appellant established in the Court below a case, which, the common law right of the Respondent have entitled him, and, in point of fact judgment of that court, did entitle him to a different decree from that which has been pronounced: it remains to examine the evidence which the Respondent sought to answer and to state the reasons why that evidence which the decree proceeded, ought to be ineffectual for the purpose for which it was used. In so doing, the Appellant labours under no disadvantage, that the evidence consisting of ancient documents, which are adduced in proof of possession of centuries, it is necessary and reasonable for him to examine their admissibility.

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their construction, with strict and even grammatical minuteness.

The first general remark which applies to the whole of this evidence (excepting the extracts from the Ecclesiastical Survey, which are entirely consistent with the existence of the money payment) is, that they were used in a suit between a rector and a parishioner, for the purpose of affecting the interests of the latter, and that this being the nature of the suit, and the purpose for which they were used, they were all instruments either exclusively recording transactions between the patron and ordinary, or when those characters were united in one person, between him and the incumbent, or purporting to be ordinances by the ordinary; that the parishioner was in no respect a party to them; and that, as they did not profess to dispose of his interests, so his interests could not be bound by them. The Appellant may concede, that they are valid, as to the disposition of the tithes when raised, or as to the person to whom they should be paid—questions in which he is little concerned; but the matter now at issue is a different one: in what form, namely, the tithes have been, from time immemorial, paid to the tithe-owner, whoever he may have been?

In making this remark, we are aware that it will be urged, that the same person who was ordinary and patron, was also a parishioner, and that, in one document, he does profess to regulate the very point in dispute,—the mode, namely, of the payment of his tithes, and that his declaration and acts are evidence against the present Appellant. But this argument assumes the privity of the Appellant with the patron and ordinary; if there be no such

privity, the objection to the evidence remains unanswered ; and, therefore, such privity should have been proved in the regular manner : no evidence was offered for that purpose, but those very declarations and ordinances themselves, the whole validity of which, as evidence against the Appellant must depend on some original and extrinsic proof of such privity.

Another general remark, which applies to these documents, arises upon the manner in which they have been attempted to be proved. This was endeavoured to be done, in every instance, by copies entered in a book, which was said to contain the registers supposed to have been kept by the bishops for the time being, of the transactions occurring within their respective episcopacies ; but no account was given of any search for the originals ; nor, supposing it to have been satisfactorily proved that the originals had once existed, and had been since lost or destroyed, was any information afforded of the manner in which, or the authority by which, these supposed copies were made in the registers ; and it is remarkable, that, although these documents professed to relate to transactions extending through more than a century, they all came from one book, and that not a very large one. These remarks disclose so much that is objectionable in the nature of the evidence, on which the decree professedly proceeded, as to make it fit and proper again to submit the case to the judgment of the Court below.

Another general remark, applying to all the documents which profess to regulate the tithes of the parish, is, that while each of them wants some one or more formal requisites to their validity, for the

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particular purposes for which they profess to be made, they are all destitute of that evidence of having been submitted to, or acted on, by the persons most interested, or of having been respected by succeeding bishops, as permanent and binding ordinances, which was necessary to make their testimony of any weight in the present dispute. As to the latter point, each succeeding bishop seems to have regarded the ordinance of his predecessor as merely temporary and occasional; and, as the former, if they ever were of that binding force which the Respondent sought to attribute to them, it is impossible to account for the fact, which is yet indisputable, that no tithes have ever been paid in kind in pursuance of them. The fallacy which appears to have influenced the judgment of the Court below is, that because each succeeding document may be said, more or less, to throw light upon, and historically to confirm, some statement in the preceding, the whole series thereby acquired increased force, as evidence, for the purpose for which they were used in this cause; whereas, upon consideration, it is obvious, that even a concession of the fact, that certain ordinances were made at certain times, will leave the question of the weight of each ordinance, its bearing, and its admissibility, to be determined by itself, without reference to any of the others; and that, if solid grounds of objection exist against each, the assemblage of the whole cannot remove them.

Subject to the preceding general remarks, it does not appear necessary to say much upon the two first copies produced, which shewed the grant of the advowson of Farrington to Bishop Bronescombe, and the appropriation of the rectory to the

sustentation of two chaplains by the same bishop. In themselves they prove nothing in the present issue, and were introductory only of the third instrument, which professed to be a copy of an ordinance, called the "Annexio Ecclesiarum de Clyst Formizon, et de Farndon." This was mainly relied on, and contains the whole strength of the Respondent's case.

This copy was stated to shew at once the origin, within time of legal memory, and the legal destruction of the money payment; with reference to the evidence which it gives upon those two points, waiving, for the present, many objections to its admissibility in the whole, and to the credit which may be properly attributable to it, if admissible: it is open to the following remarks. It professes to be an ordinance made by Walter Stapledon, who was stated to be the second in succession after Bishop Bronescombe, a Bishop Thomas Bitton having intervened; it begins with reciting, that the foundation of Bishop Bronescombe, for the support of the two chaplains, had been neglected and come to decay during the episcopacy of Bishop Thomas; and that Bishop Stapledon himself, by a former ordinance, had revived and altered it, having removed the two chaplains to a new chapel which he had built in a more convenient situation, and newly regulated the endowments of the vicar of Farringdon, part of which endowments he, the said Bishop Stapledon, states that he had ordained to be the tithes, great and small, with all oblations and obventions arising from the ancient demesne of his manor of Clyst; "for which
"tithes, however, we were willing to satisfy the
"vicar for the time being, by the payment of 40s.

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“ and 8*l.*, and are able to apply the tithes themselves to our own uses, according to a certain ordinance.” It was said, that the words, which have been literally translated, proved the commencement of the money payment in an ordinance made by Bishop Stapledon; this interpretation is open to the most serious objections:—First, it assumes (and this assumption was in fact made), that the words “a certain ordinance” (*quandam ordinationem*) were equivalent to “the said ordinance” (*prædictam ordinationem*), for which there is no pretence. Secondly, if that assumption be not made, it will be necessary to assume that the ordinance, so referred to in general terms, was some other ordinance made by Bishop Stapledon himself, of which there is not the slightest evidence; and as to which, if it were allowable for the Respondent to state a usage of such antiquity by mere presumption, the probability is all the other way; for no one can doubt, who reads the whole instrument, that Bishop Stapledon, if he had been alluding to an ordinance made by himself, would have used such words as occur in the very next sentence of the instrument, “*nostram super hoc factam ordinationem*,” while there is nothing improbable in supposing that he would describe as “a certain ordinance” any regulation as to payment, the commencement or authors of which were unknown to him, and lost in remote antiquity. Thirdly, this interpretation assumes that Bishop Stapledon, who is clearly reciting an instrument which was, in the legal acceptance of the term, an episcopal ordinance, *i. e.* the endowment of a vicarage, uses the word in this place in its strict legal sense; whereas the form in which

he, as a parishioner, should pay his tithe incumbent, was not a matter within his jurisdiction; and it must be taken, therefore, here uses the term in a popular sense, it is more likely for him to have used it with reference to an ancient regulation than to a modification made by himself with the vicar for the purpose of being.

From a verbal examination of other parts of the instrument, it is clear that this recital, though strong evidence of the existence of the writ, is not a precedent in the reign of Edward II., is not evidence of its having commenced at that time; and so, we pass on to shew that the instrument itself contains no proof of its legal validity. The words on which the Respondent relies are these: "*Cum igitur universalis ecclesia sit corpus mysticum sit censendum, non inconueniens, si peradmodum unius vel alterius membra sibi mutuo suffragantur, ex quo ecclesie facultatibus alterius inopia subleuetur, alterum alterius onera portare precipiat. Qua propter habitis super hoc cum dilecto Decano, et Capitulo ecclesie nostre deliberatione plenissimis et tractatu, de consilio et assensu, vocatis ad hoc Johanne Gisi Rectore ecclesie de Clist Formizor Ricardo Cole perpetuo vicario Ecclesie Farndon preedictae nostrae diocesis, et ratione episcopatus nostri existentium, ac juris solemnibus (quae requiruntur) in observatis, de ipsius Rectoris tunc praesentis multis et varias altercationes, expresso Auctoritate Ordinaria Statuimus et.*"

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“ quod omnes decimæ tam majores quam minores
 “ de antiquo dominico nostro manerii nostri de
 “ Clist provenientes, pro quibus quadraginta sex
 “ solidos et octo denarios sterlingorum in pecunia
 “ numerata juxta prædictam ordinationem solvere
 “ consuevimus, vicario ecclesiæ de Farndon, qui
 “ pro tempore fuerit, Tempore quo decima a no-
 “ vem partibus fructuum separari solet integraliter
 “ persolvantur, omni facultate tam nobis, quam
 “ successoribus nostris præfatas decimas pro præ-
 “ dicta pecuniæ summa retinendi penitus inter-
 “ dicta; ita quod a prædicta quadraginta sex
 “ solidorum et octo denariorum solutione nos et
 “ successores nostri in perpetuum simus liberi et
 “ immunes.” The instrument then goes on to
 assign to the vicar of Farringdon the tithes of other
 lands, to the value of 60s. and upwards, which had
 been in dispute between him and the rector of Clist
 Formizon, and which the latter had been accus-
 tomed sometimes to receive; it then charges the
 vicar in return with certain payments, and is sanc-
 tioned at the conclusion, by the separate consent
 of the dean and chapter. There can be no doubt
 that in the words extracted, Bishop Stapledon in-
 tended to put an end to the money payment; the
 question is, whether upon the face of this instru-
 ment he appears legally to have done so. From
 the careful formality with which the whole prelimi-
 naries are stated, the presumption is excluded, that
 any step which really was gone through, was
 casually omitted to be mentioned; it must be
 taken, therefore, that Richard Cole, the vicar,
 did not assent to the arrangement, because the
 assent of every other party is carefully stated, be-
 cause his presence is mentioned, and because he

appears to have taken part in many alt the subject. The conclusion, that R did not consent, is further strengthened considering the total absence of all affirming that these tithes ever were received in the impossibility of reconciling the presence of the same money payment, from time, up to very remote antiquity, with the proposed destruction by this instrument of this inconsistency the Respondent has no account to account.

The question then is, whether it is in the power of a parishioner, or of the ordinary, to alter a modus without the consent of the parishioners. I submit that there is no legal principle which supports the affirmative of that proposition contained. A modus, or a real composition, is not a thing reasoned upon in law, as any other agreement is, as something originally beneficial to both parties, and which, therefore, cannot be altered without the consent of both: circumstances may vary the degree of actual benefit, but the principles of legal consideration will remain the same. From the general contents of the instrument it will appear that the whole ordinance was made by the power which the bishop could not, by his own authority, exercise; a circumstance which renders probable the conclusion, that the destruction of the money payment was intended to be and ineffectual.

But, if it cannot be collected from the instrument now under consideration, that the modus was then put an end to, the instrument must follow in the order of the Respondent's petition to afford, if any thing, a contrary infer-

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instrument, it will be seen, charged the vicar of Farrington with the annual payment of twelve marks to the two priests, and of one to the rector of Clist Formizon; for which, by the payment of these tithes in kind, amongst other additions to his revenue, it assumed to furnish sufficient funds. The earliest instrument which follows, at an interval of less than forty years, is an ordinance of Bishop Grandison, which, after stating the vicar to be unable to make this payment, reduces the twelve marks to 40s., that is, to one fourth of the original sum; a reduction which can hardly be supposed to have become necessary in so short a time, if the ordinance of Bishop Stapledon had been in all parts executed after his death.

It is unnecessary to dwell upon the instrument, No. 5., which stated an exchange between the rector of Farndon, and the vicar of North Pyder Wyn, in 1372; or the two extracts read from the *Valor Ecclesiasticus*. The effect of these might be to shew that the ordinance of Bishop Grandison had been observed as to the payment of the 40s., which to this day is continued to be made by the Respondent to an ecclesiastical body, representing the two priests before mentioned; but they, none of them, in any way recognise the validity of the ordinance of Bishop Stapledon, in that part of it which is alone now in dispute; and they are all perfectly consistent with the continuance of the money payment^a thereby supposed to be destroyed.

As no evidence has been given by the Respondent which is admissible in the shape produced, or, if admissible, would form a legal answer to the Appellant's case, or if both admissible and legal, is entitled to the conclusive weight which has been

given to it in the Court below, the decree ought to be reversed.

For the Respondent.

The Appellant's evidence did not shew alleged customary payment, *modus*, *2l. 6s. 8d.* had ever been paid in lieu of the demesne lands belonging to the manor within the rectory and parish of Farrington on the contrary, as far as it was applicable any payment in lieu of the tithes of such lands applied to a different sum of money.

The documents adduced in evidence shewed, conclusively, that *2l. 6s. 8d.* had not been paid in lieu of the demesne lands belonging to the manor within the rectory and parish of Farrington before the time of legal memory ; but on the contrary, the first commencement of such a sum of money in lieu of such demesne lands, at a period subsequent to the time of legal memory, and the date of such payment, shortly after its commencement.

On the 14th of April, the decree was reversed on the motion of Lord Denman.

I N D E X.

ACCOUNT. *See* LIMITATIONS, STAT. OF. P. PIN-MONEY. PRACTICE 2.

The balance of a claim upon an account by an award in 1799, which was neither expressly rescinded. This account, other claims, was made the subject of sentences, from time to time, until the year a balance was ascertained upon a negotiable debtor executed a mortgage to secure the this time, judgments and executions, which obtained by the creditor, were outstanding effects of the debtor. In 1827 and 1828, in consequence of difficulties in making available for the liquidation of the debt, pro old judgments for parts of the amount secured by mortgage. Upon a bill filed by the debtor the mortgage deed, and open the account ground of oppression by the creditor, and account, and a cross bill by the creditor to deed or take the account upon the foot of was made dismissing the original bill, and account upon the cross bill; and this decree upon appeal, except as to a sum of £1, amount secured for insurances upon the debtor, it not being alleged or proved that had paid such insurances. And also such part of 1000*l.* as had been paid by the debtor which had been erroneously included in secured by the mortgage, and in respect of which the decree was reversed, and the account to be taken, with allowance of credit to the such sums.—*Marquess of Donegal v. Grattan*

ACTION.

1. K., a customer of M. and Co., bankers, with whom she kept an account, gave a power of attorney to the partners, to receive the dividends upon her stock in the government securities: under this power the dividends were at different times received by M. and F., two of the partners. In 1824, under a power of attorney forged by F., 9000*l.* 3 *per cent.* reduced annuities, part of the stock of K., was sold for 6000*l.* 13*s.* 2*d.*, and transferred in the bank books to T., who had other stock of the same kind. Half of the commission upon this transfer was paid by the broker to M. and Co. The proceeds of the stock thus sold, were paid into the house of M., S. and Co., to the account of M. and Co., and entered in a passbook, which, from time to time, was sent to M. and Co. After the transfer, balances were at different times struck between M. and Co., and their agents, M., S. and Co. In 1825, F. being indicted for other forgeries, was convicted and executed. No indictment was ever preferred against him for the forgery in question. Upon these facts (being found by special verdict): Held, that K., in an action brought against M., and the surviving partners of M. and Co. for the proceeds of the sale of the stock, as money had and received to her use, was entitled to recover.—
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2. By letters patent, 10 Cha. 1., the borough and pier quay of Lyme Regis, with all the privileges, &c. to the town and quay belonging, were granted, &c. to the mayor, and burgesses, and their successors, to hold, &c. in fee farm for ever. The letters patent provided that the mayor, &c. should, at their own cost, thenceforth from time to time, for ever, repair, &c., as often as should be necessary, &c. the buildings, banks, sea shores, &c. within or belonging to the borough, or situate between the borough and the sea; and also the pier quay. The mayor was, by the letters patent, appointed clerk of the market within the borough, with the fines, &c. belonging to that office; and a licence was granted to the mayor and burgesses to dig stones and rocks in any places within the borough, out of the sea and on the sea shore, for the reparation of the port, and the building called the Pier Quay, and other necessary reparations and common works of the town and borough, and building aforesaid.

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In an action upon the case against the corporation, the declaration set forth the letters patent, which were accepted by the corporation: and the corporation had thenceforward enjoyed the profits of the letters patent; that the Plaintiff possessed of a house and land within the parish abutting on the sea shore; and that the time of the sealing and acceptance of the letters patent was a sea bank between the borough and the land formed, and of right ought to be a profit in the house and land of the Plaintiff; and which the Defendants, by virtue of the letters patent and acceptance thereof, were liable to repair at the expense as often as might be necessary; and that the Plaintiff should repair the house and land of the Defendants undated and injured: Held, after verdict for the Plaintiff, of not guilty, that this declaration disclosed a legal cause for action. — *Lyme Regis v. Henley*

ADMINISTRATION. See PROBATE DUTY.

AGREEMENT.

By bill in equity, it was alleged that Kemp had entered into an agreement for the purchase of a house from King, the Defendant, to transfer to him the house of the agreement, for a sum of 3000*l.*, and to give him a conveyance of the premises; and that the agreement was drawn up in the following words: "Mr. Kemp, when the title to the estate of the Defendant King, and the same shall be regularly conveyed to the parties, I will be accountable to you for the sum of 3000*l.* upon receiving a proper release from Mr. Wilson for the same. I am, your obedient servant, 15th of June, 1818:" That Kemp immediately afterwards borrowed 3000*l.* of B. upon this order of the Defendant King, and delivered an order to King to pay the money to B. The Defendant King, by his answer, admitted that the contract was made with Wilson, who was a certificated bankrupt, but that the name of Wilson was used as a cover against his assignees, and that the money was obtained a conveyance and possession of the premises not through Kemp or Wilson, but by negotiation with the owners. There was no evidence on the part of the Plaintiff in support of, or in contradiction to, these admissions of the transaction, except as appearing from the terms of the agreement, and by a letter,

from Wilson to Kemp, in which he says, "It has always
" been known to you that the money in King's hands
" has always been the only tangible means I had to settle
" my affairs with you."

Upon this state of the pleadings and proof, the bill was
dismissed; and upon appeal the order was affirmed.—

Staley v. King - - - Page 716

ANSWER. See PLEADING.

BILL OF EXCHANGE.

Upon the dishonour of a bill of exchange by the acceptor,
a letter was written to the indorsers in the following
terms:—"A bill for 683*l*. drawn by J. upon D. and Co.,
" and bearing your indorsement, has been put into our
" hands by the assignees of A.," (the holder who had be-
come bankrupt,) "with directions to take legal measures
" for the recovery thereof, unless immediately paid."

Upon a bill of exceptions to the direction of the judge,
upon the trial of an action against the indorser to recover
the amount of the bill: Held that the letter was not a suf-
ficient notice of the dishonour and non-payment of the
bill to entitle the Plaintiffs to maintain the action.—

Solarte v. Palmer - - - - - 874

CHARITY.

1. By letters patent in 1572, Queen Elizabeth, upon the prayer
of Alexander Nowell, Dean of St. Paul's, restored and
founded the free grammar school of Middleton in Lan-
cashire, providing that the principal and scholars of Bra-
zen Nose College in Oxford should be governors of the
school, who were incorporated by the name of Govern-
ors, &c.; and that there should be of her own foundation
six scholarships, to be filled by scholars from Middleton
School, to be nominated by Dean Nowell as long as he
should live, and at his decease, by Brazen Nose College
and their successors, with licence to Dean Nowell to
erect seven other scholarships, to be filled by scholars
chosen from Middleton School, if so many fit scholars
could be found therein, or, in default, from such other
schools as therein mentioned; and power was given to
Dean Nowell to fix the stipends to be paid to the scho-
lars; and to him and the college successively, to make
statutes and ordinances for the governance of the mas-
ters of the free school, and of the scholars in the college
and their stipends respectively, and for the preservation
and disposition of the rents and revenues for the support
of the school and scholars. The letters patent then set

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forth the gift of certain rents by the college, to hold to them and their successors of the school, "*ad proprium opus et usum*" "cipalis et scholarium ejusdem Aulae R" "de Brazen Nose in Oxon, *Gubernatorum*" "prædictæ, &c. Eâ tamen intentione quod" "per præsentis præconcessis et ex" "imposterum ad usum liberæ scholæ," "iidem, &c. gubernatores," &c. should stipend of twenty marks to the master and ten marks to the under master, &c.

By letters patent dated in 1579, the Queen's college, as governors of the free school of Upbery, &c. (which had been vested in the hands of Dean Nowell,) to hold, &c. in mortmain, willed that the principal and every one of them should take an oath that they would pay the rents, &c. of the manor &c. in all things as follows, viz. every year to each of her scholars elected out of her free school of Merton *their support (ad ipsorum victum) 3l. 6s. 8d.* every week for the improvement of the college. Moreover she willed that any prior or scholar at the time of his election and admission into the college should take an oath at the public assembly of the fellows of the college, that they would employ the rents, &c. for the purpose aforesaid; and any fellowship should be vacant, would admit (*such fellow*) from among her said scholars who should be either be superior or equal to the other scholars in erudition, probity of conduct, or piety.

The funds for the support of the institution were chiefly by Dean Nowell, and they exceeded in amount the provisions made by the letters patent to the master, under master, and scholars of the college. It appeared that Dean Nowell during his life had permitted the surplus of the revenues be applied for the use of the school, to be applied to the use of the college. In the year 1700 the scholarships were consolidated into one; and in 1701 they were in decay; for many years no scholar had been elected from it to Brazen Nose; and the bulk of the charity, which had increased to a very great amount, had been applied to the use of the college.

- the circumstances that this application of the fund was legal. — *Att. Gen. v. Brazen Nose College* Page 377
2. In the year 1710 lands in Ireland having recently before they were vested in trustees for a charity, been let for 100*l. per annum*, which as far as appeared was a fair rent, were leased by the trustees at the same rent for a term of three lives, upon a premium of 300*l.* with a covenant for perpetual renewal upon the dropping of a life, paying 25*l.* for each renewal. In 1782 the lease was renewed upon payment of the fine. Upon information filed to rescind the lease: Held under the circumstances, the state of Ireland at the time of the original lease, the practice of the country relating to such leases, and the long acquiescence, that the interest of the lessee ought not to be disturbed. — *Attorney Gen. v. Hungerford* - 437

CONDITION. See ACTION, 1.

CONSTRUCTION. See ACTION, 1. CHARITY, 1. DEVISE *passim*.

COSTS. See PARTNERSHIP, 1. PLEADING, 2. POWER.

COURTS.

The Irish Statute 17 & 18 Cha. 2. c. 20. has the following recital and provision: — "Whereas heretofore issues
 "joined in any of his Majesty's four Courts at Dublin,
 "triable in the city or county of Dublin, have been usually tried at the bar in the said courts in Dublin: And
 "whereas by the number of actions brought in the said
 "city and county, for speediness of trial for small causes,
 "the judges of some courts may be letted and hindered
 "in their proceeds in matters of great weight depending
 "before them, by demurrer or otherwise, not only to the
 "great delay of justice and occasion of great expenses
 "and charges of a number of his Majesty's loving subjects, but also to the trouble and charges of the citizens and freeholders of the said city and county, who
 "are compelled to give daily attendance at the bar of
 "the said courts for the trial of the said issues; for the
 "remedy whereof be it enacted, that from henceforth the
 "Chief Justice of the King's Bench for the time being,
 "upon issues joined or to be joined in the Court of
 "King's Bench or in the Court of Chancery; the Chief
 "Justice of the Court of Common Pleas for the time being, upon issues joined or to be joined in the Court of
 "Common Pleas; and the Chief Baron of the Court of
 "Exchequer for the time being, upon issues joined or to
 "be joined in the Court of Exchequer; or in the absence or default of any of them, one or more of the

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“other Judges or Barons of the same several Courts
 “where it shall happen either of the said Chief Justice
 “or Chief Baron for the time being to be absent, shall
 “or may, at their own discretion, within the place
 “where the said Courts are or shall be commonly kept
 “in the said city or county of Dublin, within the term,
 “or within four days next after every or any term, severally try all manner of issues joined or to be joined in
 “any of the said several courts, which by the ordinary
 “course of the law of the realm ought to be tried in any
 “of the said courts by an inquest of the said city or county of Dublin.” A bill of indictment for subornation of perjury was found at the session of *Oyer and Terminer* for the city of Dublin. The Defendant pleaded not guilty, and issue was then joined thereupon. The indictment and proceedings, with all things touching the same, were afterwards removed into the Court of King’s Bench: Held that a legal trial of that issue could not take place at *Nisi Prius* in the Court of King’s Bench under the Irish statute 17 & 18 Car. 2. c. 20. — *Rowe v. the King* - - - - Page 1

DEBTOR AND CREDITOR. See ACCOUNT. PARTNERSHIP, 1.

DEVISE.

1. Upon a will devising lands in trust to be conveyed and settled to the use of L., the devisor’s eldest son, for his life, remainder to his second, third, fourth, fifth, and *all and every other* the son and sons of the body of L., lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the heirs male of their bodies respectively: Held, upon the words and context of the will, making provisions inconsistent with the intention, that a first son of L. should be excluded — that such first son took an estate in the lands in tail male. — *Langston v. Langston* 167
2. T., by his will, after bequeathing to his wife, and a married daughter, and an infant son, portions of a profit rent of lands held by him on lease in Ireland, and stating that the account of his profit rents would be found in his new rent book; and after reciting that it appeared by the rental that there was a profit rent of 674*l.* (arising from a leasehold, called Thornhill Hall), which he apportioned between his eldest and his third son, the will con-

tained the following clause : — “ And whereas there
 “ also appears on the lands of Killeen, over and above
 “ the head rent of the same, a profit rent of 251*l.*, I be-
 “ queath 200*l.*, yearly, of the above profit rent, to my
 “ second son R. K. T., for his own sole use and benefit,
 “ during the term of the said lease, being for mine, his
 “ own, and his brother George’s life,” &c. The testator
 then, by his will, proceeded to recite the amount of
 other profit rents appearing in his rental book, and to
 bequeath them to others of his sons. The will then con-
 tained the following clauses and provisions : — “ And
 “ whereas there appears out of the lands of K., as now
 “ set, a profit rent of 392*l.* 1*s.* 7½*d.* sterling, out of the
 “ same, over and above the head rent of the same ;
 “ now, be it known, that I leave and bequeath 100*l.*
 “ yearly, of the same, to each of my three daugh-
 “ ters, Ann, Caroline, and Elizabeth Thornhill ; the
 “ residue of the said profit rent being 92*l.* 1*s.* 7½*d.*
 “ sterling, I leave to my fifth son, Badham Thornhill,
 “ for his sole use and benefit, together with all future
 “ benefits and emoluments arising out of the same, ex-
 “ cept as before excepted. And whereas there ap-
 “ pears a profit rent of 79*l.* 15*s.* sterling, arising out of
 “ part of Thornhill Lawn, set by lease to Robert Lewis,
 “ not included or mentioned in the demesne lands of
 “ Thornhill Lawn, before-mentioned ; now, be it known,
 “ I leave said rent not subject to pay any part of the
 “ head rent, that being already paid by the demesne
 “ and lands of the said place, the above profit rent as
 “ follows, viz., 30*l.* yearly, of the same, to my daughter
 “ Ann Thornhill, 29*l.* 15*s.* to my daughter Caroline, and
 “ 20*l.* sterling, to my daughter Eliza, in addition to the
 “ sums of 100*l.* each left them out of Knockanevin ; toge-
 “ ther with all future advantages, if any should arise out
 “ the same, held by said Robert Lewis ; and further, if
 “ any of the *above legatees should die, or die unmarried*,
 “ I leave the property bequeathed to them, with all
 “ benefit arising out of the same, to be divided equally,
 “ share and share alike, among the survivor or survivors
 “ of them. And also, in like manner, if any of the lives in
 “ the leases should die, *so as to leave any of the said lega-*
 “ *tees unprovided for*, by the lapse or fall of said life or
 “ lives in any of the above bequests, that in such case a
 “ proportion shall be deducted from the bequest of each,
 “ to make up the deficiency, by the determination of

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- “ such lease, as it shall so happen to fall
 “ to the loss sustained, and in proportion
 “ of the survivor or survivors.” Then, certain monies recovered by decree, and upon bond and otherwise, and directing to be applied to pay his bond and judgment, and the residue of the said monies to be divided equally among all my legitimate children, mentioned in this will, Myself included, except,” &c. “ The residue of the real and personal estate, to be sold and the proceeds thereof to be given to my wife for her support; the residue to be divided equally among my three daughters, Ann, Caroline, and Elizabeth. Then he incidentally directed that his estate should pay to J. F. “ 10*l.* yearly, during his life, out of the profits of the *Thornhill Lawn*.” Held, that the clause applied only to the bequest to the daughter, and upon the whole context of the will, that the bequest to R. K. T., of the profit rent of the *Lawn*, was cut down to a life estate with an executory interest upon his dying unmarried, to the survivor of the said children. *Thornhill v. Hall*
3. J. H. by his will gave to C. H., his adopted daughter, 20,000*l.* 3 *per cent.* consols, and his house and other property, at C. and M. The will then provided the following terms: — “ But in case of her death, *lawful issue*, I then will the money so bequeathed to be equally divided betwixt my nephews, *if any*, *may be living at the time*; and the residue to my nephew, the Rev. J. H., and the residue to my nephew, Lieutenant J. H., &c. I request D. S. to be her guardians, and allow her 100*l.* per annum for her education, annually, and when she is left school; and if she marries it must be with the consent, and the property to be sold by her *herself and children*, and in no way charged.” Held, that under this limitation the consols vested absolutely in C. H. — *Case*
4. V. by his will bequeathed to trustees all his goods, furniture, pictures, books, linen, &c. and to permit his wife to have the use of them during her life, and upon her death to permit his son, A., to have the use of the same goods, &c. for his life

decease of the survivor of his wife and son should be possessed, &c. in trust for such person as should from time to time be Lord V., it being his will that the goods, &c. after the decease of his wife, should from time to time go, and be held and enjoyed with the title of the family, as far as the rules of law and equity would permit: Held, that the limitation over was void, as being too remote, and that the estate vested absolutely in the eldest son of A. B., grandson of the testator, who was living at the date of his death. — *Tollemache v. Earl of Coventry* - - - - - Page 547

5. R. N. by his will devised to F. N. and his assigns, for his life, all his real estates in W., without impeachment of waste, *except the timber growing in the park avenues, demesne lands, and woods adjoining to the capital messuage, called Arbury*; remainder in trust for C. N. N. for life; remainder to his first and other sons in tail male: Held, that the restriction as to cutting timber, was confined to the premises specified in the exception clause, and ought not to extend to the woods adjoining to the excepted parts, nor to the avenues made by the testator in those woods; and that no proceeding for equitable waste could be maintained as to trees planted, &c. for ornament, &c. as to a house which had formerly been a principal mansion, and having gone to decay, had been restored by F. N., the tenant for life: Held also, that the Plaintiff having made a case by his bill for an inquiry and account as to equitable waste, and having had the opportunity of supporting that case by evidence, which he had omitted to do, was not entitled to an issue as to that equity, nor to raise the question anew in a supplemental or other suit, although the bill as to that equity had not been dismissed by the decree. — *Newdegate v. Newdigate* - - - - - 734

DISCOVERY. See PRACTICE, 2.

DOMICILE. See PROBATE DUTY.

EVIDENCE. See DEVISE, 5. PARTNERSHIP, 1, 2. PRACTICE, 2.

A suit having been instituted in the Court of Chancery in England, to carry into execution the trusts of a deed executed by D. in 1799 for the benefit of creditors holding debentures, the assignees of a bankrupt firm claiming under two debentures, which had been deposited with the firm, for balances due and to become due to them, went in under the decree to prove their claim. The

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Master reported as to one of the debentures No. 26. that the sum secured by it was due under the deed of trust, but that there was not sufficient proof to establish the right of the claimant. Pending this suit, a bill was filed in the Court of Chancery in England for the administration of the estate of the bankrupt firm, in which by an order of Court, a receiver of that estate was appointed. In this state of proceedings, and while the creditor's suit in England was pending, a bill was filed in the Court of Chancery in Ireland by the assignees of the bankrupt firm and the receiver, for the same purpose as the suit then pending in England, viz. the execution of the trusts of the deed 1799 and payment of the creditors holding debentures. In this suit proof was given before the Master, of the execution and assignment of the debenture No. 26. of the search for, and loss of, the original and of an examined copy. Upon this proof a decree was made declaring the right of the assignees, and for payment of a certain portion of the sum due upon the debenture to the receiver. This decree was affirmed on appeal. — *Donegal v. Salt* - - Page 853

FOREIGN JUDGMENT. *See* JURISDICTION.

FELONY. *See* ACTION, 1.

FORGERY. *See* ACTION, 1.

INTEREST. *See* PRACTICE, 2.

ISSUE. *See* COURTS. DEVISE, 5. PRACTICE, 1. SOLICITOR AND CLIENT.

JUDGMENT. *See* PRACTICE, 2.

JURISDICTION. *See* COURTS. EVIDENCE. PARTNERSHIP, 1.

Upon a bill filed in the Court of Chancery in England, by creditors, a decree was made to execute the trusts of a deed by which lands in Ireland were vested in trustees for the payment of debts. The debtor, a peer of the realm, did not answer the bill nor appear at the hearing of the original suit; but filed an answer to a supplemental suit, and by cross bill impeached the debts as fraudulent, and opposed the proceedings by counsel in various stages of the supplemental suits. By the decrees in these suits, an injunction and a receiver were appointed; but it being found impracticable to execute the decree, a bill was filed in the Court of Chancery in Ireland, to carry the former decree into execution: Held, reversing the judgment of the Court below, that under the circumstances, the Court had jurisdiction; that the

propriety of the English decree might be examined in the suit in Ireland; but that if part of it was sustainable it might so far be executed by the aid of the Irish Court, although other parts might be erroneous. — *Houlditch v. Donegal*. - - - - - Page 301

LACHES. See LEGACY. PRACTICE, 1.

LANDLORD AND TENANT.

T. by indenture dated in 1663, demised to W. lands, &c., in Ireland, together with the mines, timber, &c. to make sale, &c. thereof without impeachment of waste; the lessee his executors, &c. planting from time to time, 500 trees of oak and ash in the room &c. during the lease, to hold, &c. for a term of ninety-eight years, at a rent of 15*l.* sterling for the first three years, and 30*l.* sterling for the remainder of the term: and T. covenanted that he, &c. upon request, would "from time to time renew the said lease and perfect such other further assurances as W. &c. should require, &c." The lease also contained a covenant of warranty of title, &c., and that in case of eviction, or that the premises should be wasted in war or rebellion &c., that the rent should cease for the time. By an indenture dated in 1739 reciting the original lease and the covenant for renewal a further lease for ninety-eight years, (recited to be in pursuance of the covenant &c.) was granted containing a similar covenant.

Upon Bill filed in 1827 claiming a further renewal: Held that the covenant was to be construed as a covenant for further assurance and not for perpetual renewal. —

Browne v. Tighe - - - - - 272

LEASE. See LANDLORD AND TENANT.

LEGACY. See PROBATE DUTY.

W. being resident in Jamaica, by his will dated in 1768 gave to J. C. 1000*l.* Jamaica currency, and to M. H. and H. C. 500*l.* each of the same currency, to be paid to them when they should arrive at the age of 16 years; and he desired that the legacies should be paid out of the money due to him on bonds from J. C. (the above named legatee) and his mother; and he appointed J. C. one of his executors. By a codicil dated in 1792, he gave to J. C. 1000*l.* currency of, &c. over and above what was given by the will. The testator after the date of the will and codicil left Jamaica and became resident and died in Scotland in 1790. It was found by a report made in a suit for the recovery of the legacies, that J. C. in October, 1773, was indebted to the testator in a sum of 263*l.*

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sterling, which was secured by bond of the usual form, and that in 1774, J. C. v the testator in the further sum of 700*l.* bond. There was no other evidence of otherwise owing by J. C. to the testator the will and codicil, except as appears by of the will. In 1794 judgments were re J. C. in Jamaica upon the bonds above ; no steps appear to have been taken to e ments against J. C. who was not then c maica: the legatees were born and rem in Jamaica, until after the death of the J. C. and M. H. left the island and acqu England or elsewhere. In 1791, adminis will annexed, was granted in Jamaica. 1801, and administration of his estate, wit ed, was granted in Jamaica to J. G. C. hi M. H. and H. C. in consideration of 25*l.* them by J. G. C. and also of friendship him, being their nephew, and of assistance from him, assigned to him their respec 500*l.* and 500*l.* with all interest due there bill was filed by W. G. the personal repre against J. G. C. and others to obtain paym owing upon the judgments out of the est October, 1821, J. G. C. and M. H. filed G. to recover the legacies given by the v ministration, with the will of W. annexed, W. G. by the Court of Probate in England 1821, before which time there had been n of the estate of W. in England: Held upon stated, that it ought to be presumed that t been satisfied. — *Campbell v. Sandford*

LETTERS PATENT. See ACTION, 2. CHA LIMITATION, STATUTE OF.

A. in 1799 purchased shares in a ship of G. also shares in the same ship, was entrusted other part owners with the whole management and to keep the accounts relating to it from the purchase until the ship was sold by consent of all the owners in 1805. Upon of the sale G. R. stated and settled accounts one of the part owners, and paid him thereupon the earnings of the ship and the purchase sale. In 1824 G. R. died. Upon a bill

March, 1826, for an account against the executors of G. R. it appeared by a ledger (found in a room wholly disused by G. R.,) containing the accounts of the ship, that the credit and debit account between him and A. was not carried beyond 1805. On the debit side there were two, items one in 1811, and another in 1812. It appeared in evidence that A. left England in 1820, and some time after his departure his brother-in-law (a witness for A.) called several times upon G. R. with messages from A., and on those occasions asked him to come to a settlement with A. respecting the ship; that G. R. evaded the subject, but never stated that he was not indebted to A. Under these circumstances an account was decreed against the executors of A. and that decree affirmed on appeal.—*Robinson v. Alexander* Page 352

MORTGAGOR AND MORTGAGEE. See PRACTICE, 2.

NOTICE. See BILL OF EXCHANGE.

PARTNERSHIP. See ACTION, 2.

1. P. and D., in the year 1814, commenced a partnership as solicitors. W. was a client of the firm, and employed D. as his private agent to receive his rents. The partnership was dissolved in 1817, when W. was indebted to the firm for a bill of costs in a sum of 867*l.* and D., upon a settlement of the partnership accounts between him and P., was found indebted to P. in a sum of 750*l.*, for which he gave security, and agreed to assign to P. the outstanding partnership debts. Of this settlement, debt, and agreement, notice was given to W. in 1821. During the partnership and afterwards, D. had received monies on account of W., beyond the amount of the bill of costs: there was no evidence of any direction given by W. to D. to apply the monies received by D. on his account to the payment of the bill of costs, nor of any settlement of accounts between W. and D.; but it was in evidence that upon one occasion W. said to D., that he had better keep some money of W. which he had in his hands as he might want it. A bill in equity filed by P. stating these facts, and that D. had possession of the partnership books to which P. had no access; that D. had refused to concur with him in suing W. at law, or to permit the use of his name for that purpose; and that by collusion between W. and D., the monies of W. received by D. had, as they pretended, been applied to payment of the partnership debt, and praying an account and payment of the debt, was dismissed by the Master of the Rolls; but on appeal

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to the Lord Chancellor, this order was reversed, and a decree for account and payment made as the executors of W., and this decree was affirmed. The costs of the appeal were given, notwithstanding the difference of opinion. — *Nottidge v. Prichard*

2. Upon the formation of a partnership between T. and C. it was agreed that T. should bring into the new partnership 40,000*l.* of good debts owing to a firm in which T. had become the surviving partner for the purpose of meeting the claims by debts transferred from the old firm to the new; upon which condition C. was to have two thirds of the profits of the new partnership, and T. one third. But if 40,000*l.* of such debts were not brought in, then the division of the profits was to be in moieties. Debts to an amount exceeding 40,000*l.* were accordingly transferred, and became part of the partnership funds of T. and C. out of which they respectively drew for their several use, and also advances were made to the custom of the firm in which T. was the surviving partner. Upon a bill in equity by the executors of T. praying accounts, &c., and upon a reference to the Master whether 40,000*l.* of good debts had been brought in according to the agreement; and if so, to take the account accordingly, and if not, to take the account as to the existence of any new agreement, and also to inquire whether any new agreement had been entered into to share the profits in moieties. The Master found that 40,000*l.* of good debts had not been brought in, but he did not proceed to take the account, as to the existence of any new agreement. The decree upon exceptions was confirmed, and the account was to be taken in moieties chiefly upon the assumption of the existence of a new agreement: Held on appeal that 40,000*l.* of good debts had been brought in according to the original agreement; that exceptions ought to have been allowed on this ground, and the matter ought to go back to the Master to take the account in inquiry directed by the original decree. — *Copland*

PERPETUITY. See DEVISE, 4.

PIN-MONEY.

F., upon her marriage with C., under the trustees' settlement, executed in 1771, became entitled to annuities, charged upon land, by way of mortgage, amounting to 1000*l.* *per annum*. C., with

became Duke of Norfolk, died in 1815. In 1816, upon a commission of lunacy, F. was found a lunatic, without lucid intervals, from December, 1782. During all this time she had lived with her husband, and in general society, according to her rank. In 1820 F. died intestate. Upon a bill filed in Chancery by the administrator of F. against the executor of C., claiming arrears of pin-money from December, 1782, to the death of C.: Held, upon appeal reversing the decree of the Court below, that the claim, under the circumstances, was not sustainable. — *Howard v. Digby* - Page 224

PLEADING. See ACTION, 1. DEVISE, 5. PLEADING, 1, 2. POWER.

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 " quired to pay, assign, and transfer, the sai
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 " any deed, &c. or by her last will, &c. sh
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 " and pay, apply and dispose, of the
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 " quired to pay, assign, and transfer, the said trust monies
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 " parts thereof, unto such person or persons, for such in-
 " terest or interests, and in such parts and shares and
 " proportions upon such trusts, and to and for such ends,
 " intents, and purposes, and with, and under, and subject
 " to such provisions and restrictions or otherwise, in such
 " manner and form as S. E. B. (the wife of B. B.) at any
 " time or times, and from time to time during the life of
 " her, the said E. B. or after her decease; and notwith-
 " standing her then present or any future coverture by
 " any deed, &c. or by her last will, &c. should direct or
 " appoint, &c. and in default of such direction or
 " appointment, &c. and in the mean time, &c. upon
 " trust, during the life of the said S. E. B. to receive
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 " by any writing or writings under her hand, direct or
 " appoint; and in default of such direction or appoint-
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 " or otherwise to permit her to receive and take the same
 " to and for her sole and separate use and benefit, exclu-
 " sively of B. B. or any future husband, to the intent
 " that the same might not be subject or liable to the debts,
 " control, interference, or engagements of B. B. or any
 " future husband, &c.; and from and after the decease
 " of the said S. E. B. should pay, transfer, and assign
 " the said trust monies and securities, or such unappoint-
 " ed part or parts thereof unto the executors, &c. of the
 " said S. E. B. as part of her personal estate."

S. E. B. by her will dated after her majority, and duly
 signed and published by her in compliance with the
 formalities required by the power vested in her by deed
 poll, directed, limited and appointed, that W. H. and
 W. S., and the trustees and trustee for the time being
 of the indenture of settlement, should stand possessed

of, and be interested in, the said sum of 8000*l.* secured by the said bond as aforesaid, and other the securities upon which the same money, or any part thereof, should for the time being be invested, from and after the decease of E. B. in trust for the absolute benefit of her dear uncle W. H., his executors and administrators, and upon and for no other trust, intent, or purpose whatsoever, and which she declared she meant as a tribute of affectionate gratitude for his constant kindness and protection from her infancy, and particularly for the recent instances of it which she had experienced since her separation from her husband. S. E. B. died without having altered or revoked her will, leaving her husband surviving.

A bill, filed by the husband against the trustees, praying a declaration that, under the circumstances before stated, he was entitled after the death of E. B. to the 8000*l.*, and that it might be secured for his benefit, was dismissed with costs; and that order was affirmed on appeal, but without costs. — *Bray v. Bree*. Page 568

PRACTICE. See DEVISE, 5. PARTNERSHIP, 2. PLEADING.

1. H. being seised in fee of lands, &c. devised them to his four sons, P., J., R., and C., in succession, for their lives respectively, and to the heirs male of their bodies respectively in succession, and for want of such issue, to all and every the daughters of such sons and their heirs as tenants in common. After the death of H. the eldest son, P. entered upon the lands, &c. devised, and died without male issue, leaving E. and A. two daughters; and J. the second son of H., upon the death of P. entered upon the lands, &c. devised, and died without male issue, leaving Anne a daughter. R. and C., the third and fourth sons, died bachelors, E. died a spinster, having devised to O. her interest in the lands, &c.; A., the other daughter of P., married G. Upon the death of C., the last surviving son of H., Anne the daughter of J. claimed to be entitled to a third of the lands devised by H. &c., and thereupon an indenture was executed between Anne of the one part, and G. and A. his wife of the other part, reciting that Anne was clearly entitled to part of the lands, &c. devised; but that a doubt or question has arisen as to other parts of the lands, &c., upon one joint operation of the respective devises by H. and P., and that to avoid litigation respecting such last mentioned lands, &c., the interest, if any, of Anne therein should be, and they were accordingly to the

extent of such interest, thereby leased to G. and A. his wife for a term of ninety-nine years, if they or either of them should so long live at a rent thereby reserved. After the execution of this indenture, Anne married T., and her estate and interest in the lands, &c. was settled in default of issue of the marriage upon the survivor of them in fee. G. having died, A. married a second husband and under the settlements upon that marriage and the will of A., her estate and interest in the lands, &c. vested in the Appellants W. and W. C. who were in possession; and the estate and interest of E., the other daughter of P., vested in O., the other Appellant, who was also in possession. Anne having survived T. died intestate and without issue, whereupon the Respondents claiming as heirs *ex parte maternâ* of Anne, filed a bill in Chancery, stating their title and the facts as above set forth. They charged that there were no heirs of Anne *ex parte paternâ*, and set forth their pedigree. The bill also charged that the Defendants (Appellants) being in possession, had received one third of the rents on behalf of the heirs of Anne; that the pretence that there was an heir of Anne *ex parte paternâ* was set up to enable them to keep possession, as it would appear if they would set forth his name, residence, and the particulars of his pedigree. The bill further charged that the Defendants had, by correspondence and otherwise, admitted the title of the Plaintiffs to one third of the lands, &c.; that in such correspondence the facts and circumstances set forth in the bill, or some of them, had been admitted or noticed, and that documents, &c. were in their possession, &c. from which the truth of the allegations of the bill would appear. The bill then required the usual discovery, and prayed a declaration of the right, an account of rents received, &c. The Defendants jointly and severally pleaded to the whole of this bill, that Louisa the wife of, &c. was at the death of Anne in the bill named, and then was heir-at-law of the said Anne *ex parte paternâ* of the whole blood. This plea having been overruled upon argument, and the order to that effect affirmed on appeal to the Lord Chancellor, the judgments of the Courts below were affirmed on appeal to parliament, on the ground that the Defendants were bound to answer some of the charges in the bill, and that the plea without such answer was insufficient. — *Harland v. Emerson* 62

2. The statute 8 & 9 W. 3. c. 11. § 2. provides, that "if
" any person shall commence or prosecute, in any court

- “ of record, any action, plaint, or suit, wherein upon
 “ *demurrer*, either by Plaintiff or Defendant, judgment
 “ shall be given by the Court against such Plaintiff, or if
 “ at any time after judgment given for the Defendant in
 “ *any such action*, the Plaintiff shall sue out a writ of
 “ error and judgment shall be affirmed, &c. the De-
 “ fendant shall have his costs, &c.” This enactment is
 not confined to writs of error after judgments upon
 demurrer, but extends to all cases of writs of error after
 judgment for the Defendant. — *Ricketts v. Lewis* Page 158
3. An order of the Court of Chancery directed the new trial
 of an issue, and a commission for examination of wit-
 nesses abroad ; and that the trial of the issue should be
 stayed until the return of the commission. The parties
 having improperly delayed the execution and return of
 the commission, upon application to the Court, the whole
 of the original order was discharged : But upon appeal,
 held, that the laches as to the commission ought not to
 affect the right to proceed to a new trial of the issue ;
 and as regarded this last point the order was reversed
 with special directions — *Colvin v. Campion* - 523
 4. Upon a bill filed by L. against M., his solicitor, for a ge-
 neral account and taxation of his bills of costs, and a
 decree directing the examination of the parties upon
 oath, M. filed interrogatories for the examination of L.,
 which he refused to answer ; and thereupon an affidavit
 was filed by M. under an order of Court, verifying the
 allegations of facts suggested in his interrogatories :
 Held, under the circumstances, that this affidavit ought
 to be considered as evidence of the debt, and of the ad-
 vances of money constituting the debt by M. to L. A
 debt for 2400*l.* having been found due by the Master's
 report, to which no objections or exceptions were
 taken, and no error appearing upon the face of the re-
 port : Held, that this report could not by order made
 upon further directions be reviewed. M. having ob-
 tained judgments against L. upon warrants of attorney,
 which carried interest, and having been in possession
 and receipt of the rents of lands belonging to L. upon
 which he was by decree made accountable with interest
 Held, that the judgments ought to carry interest.
- Upon appeal and cross appeal, the House of Lords, being
 of opinion that the Appellant in the original appeal, as
 mortgagee, ought to have obtained the decree with
 costs in the Court below, gave him costs in the cross

appeal upon the principle of indemnity. — *Morgan v. Evans* - - - Page 777

PRESUMPTION. See LEGACY.

PROBATE DUTY.

1. C. A., a surgeon in the army, residing in India, and having personal estate vested in funds there, as well as real estate, and claims for prize-money, made his will, noticing the state of his assets in India, and his claims, and directing that his house and grounds should be sold by auction, and the produce placed to the credit of his estate: he left the whole of his property among his children equally, subject to certain regulations; and gave legacies to persons in England as well as in India, as expressed in his will. He thereby also noticing that his son was at school in Scotland, desired that his other children (daughters) should be taken to England. To provide for their education, he directed that his executors should place out his whole estate at interest, on landed property, or in some public funds, suggesting that those of the East India Company "were, perhaps, as secure as any," but leaving the investment to the discretion of his executors. In a letter, proved as a codicil, he directed that, after providing for certain expenses, the whole of his property at Bombay should be invested in the Company's next good loan. By another codicil he made a specific provision, calculated first in Indian and then in English money, to the amount of 8000*l.* for each of his daughters. He died in India. The executors proved the will, and there collected the funds; and having there also administered them so far as it was necessary, transmitted them to England, where suits were instituted by parties claiming interests under the will; and in the progress of these suits, the accounts being taken, the amount of the funds was ascertained; and in a report made by the Master, and confirmed by the Court, deductions were made from certain legacies and annuities payable in England, on account of the legacy duty, but none for probate duty, or legacies paid in India, or for the shares of residue paid there.

Upon a petition presented by the Attorney-General on behalf of the Crown, claiming these duties: Held that, under the circumstances of the case, they were not payable under the statutes relating to the subject. 55 G. 3. c. 184., &c. — *Attorney-General v. Jackson* - 15

2. M., a merchant domiciled in England, died, having made

his will, and leaving a large personal estate partly situate in England, and partly in the United States of North America. The executors appointed by his will, who were also domiciled in England, upon obtaining probate, paid a duty to the Crown, limited to the value of the effects in England, but proceeded to collect and administer all the personal estate of their testator both in England and in America.

Upon an information filed by the Attorney-General on behalf of the Crown, making these allegations, and claiming probate duty upon the whole personal estate, and a general demurrer to that information: Held, that the probate duty was not payable upon that part of the effects which was in America. — *Attorney-General v. Hope* Page 34

REVOCATION OF WILLS. See SOLICITOR AND CLIENT
SOLICITOR AND CLIENT. See PARTNERSHIP, 1. PRACTICE, 2.

W. being seised of lands at R. entered into a contract for the sale of part of those lands; and the title being complicated, the purchaser required that a fine should be levied of the lands under contract of sale. In this business W. employed B. as his solicitor, he being his heir presumptive. Under the advice of B. a fine was levied not only of the lands sold but of all the lands at R. belonging to W. Before the contract for sale, W. had made his will, devising his real estate to his wife. W. died a few months after levying the fine; and in conversations shortly after his death, B. used expressions which imported that at the date of the conversations at least, he knew that W. had made a will before the fine levied, and that the operation of the fine would be to revoke the will. He also, in answer to a representation that he ought to have apprised W. of that consequence, said "Why should I put a sword into his hand to cut my throat?" Upon a bill filed in equity by the widow, and an answer admitting the employment as solicitor, and the advice to levy the fine, but denying knowledge or belief that a will had been executed by W., and also denying knowledge that a fine would operate to revoke the will, issues were directed to a court of law to try, 1. Whether the Defendant fraudulently induced W. to extend a fine levied by him beyond property sold by the commissioners, &c. 2. Whether the Defendant fraudulently omitted to inform W. that the fine would revoke his will as to the lands comprised therein; and

the jury having found a verdict for the Plaintiff upon the second issue : Held, that B. was properly declared and decreed to be a trustee for the devisee.

Whether such decree ought not to have been made upon the evidence in equity, without directing issues, Quære? — *Bulkley v. Wilford* - - Page 111

SPECIFIC PERFORMANCE. See AGREEMENT.

SUPPLEMENTAL BILL. See DEVISE, 5.

TIME (LAPSE OF). See LEGACY.

TITHES.

1. Under the powers created by the statute Car. 2., F. by his will in 1671 gave, all the tithes of corn, grain, hay, and all other tithes great and small, of the parish of B., to H. F., his heirs, &c. to the use of a preaching minister, to be nominated by H. F. and his heirs. In — T. F. the descendant and heir of H. F. conveyed the tithes, with other hereditaments, in trust for the payment of creditors, and upon a bill in equity, filed by the creditors in —, they were sold under a decree of the Court, and conveyed to R. F. and J. H. (a trustee for R. F.) and their heirs, &c. in trust, as to the tithes of B., to the use of a preaching minister to be nominated by R. F. and his heirs. J. H. survived R. F. and became seised of the legal estate, and his descendant and heir in 1826 conveyed the tithes of B. &c. to T. L. F. the heir of T. F. upon the original trusts.

Before this conveyance (in 1821) T. L. F. who then had the equitable estate in the tithes of B. appointed E. the preaching minister of B. : Held, upon a bill in equity by T. L. F. and E. against occupiers of lands in B. for an account of tithes, that the title derived under the will of F. and the decree of sale for payment of debts was good in equity, and the appointment made by T. L. F., before he had the legal estate, valid : Held, also, under the circumstances stated in the report, that the tithes of corn and hay were due, except as to certain farms covered by a modus. — *Holdsworth v. Fairfax* - 882

2. To a bill in equity by L. and his lessee, against an occupier of lands, stating a seizin of the corn, grain, hay, and grass, yearly arising, &c. within a certain district or portion of land in the parish of C., and praying an account of clover, vetches, and other grasses, cut green, the Defendant pleaded that L. was not seised of any tithes within the parish of C., except such as belonged to the parsonage of Cannon (the district, &c.), which was an

impropriate rectory, to which the tithes of clover, &c. cut and taken, without being made into hay, did not belong, &c. Issue being taken upon this plea, the vicar of C. (not being a party to the suit), was examined as a witness, and deposed, that there was no endowment that he was entitled to the small tithes; and that he had always received a money composition for the small tithes, including the parsonage of Cannon, &c. The bill was dismissed, and the decretal order affirmed on appeal. — *Lewis v. Bridgman* - - Page 907

3. Held, under the circumstances, and upon the evidence, stated in the report, that lands within a parish were not exempted from tithe by a money payment of ancient date, and proof that no tithes had ever been rendered. — *Lord Graves v. Fisher* - - - 973

WASTE, EQUITABLE. See DEVISE, 5.

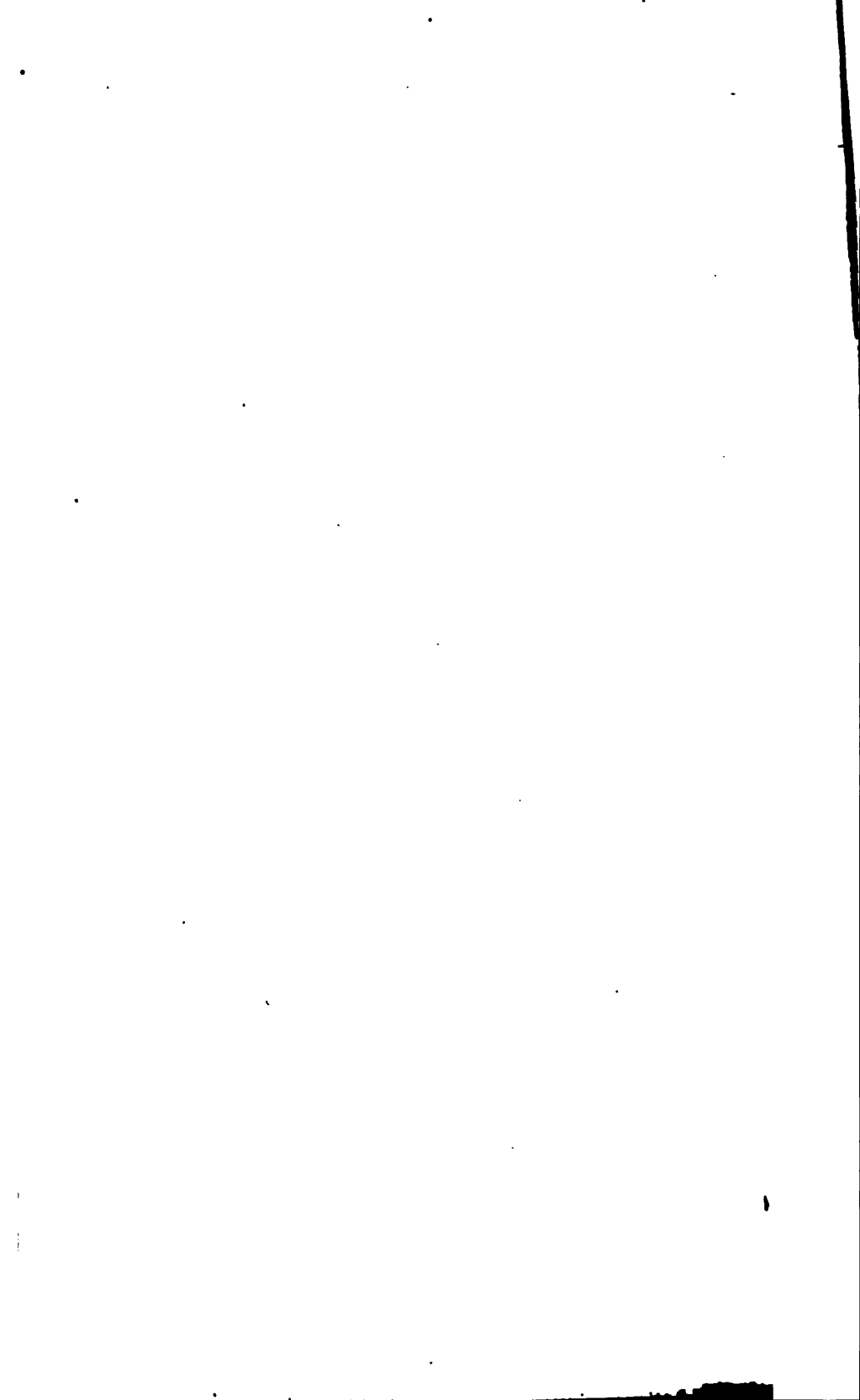
WILL, REVOCATION OF. See SOLICITOR AND CLIENT.

WITNESSES, COMMISSION FOR EXAMINATION OF. See PRACTICE, 1.

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